SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 91

IVAN C. McLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

EMPRESA HONDURENA DE VAPORES, S.A.

No. 93

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, PETITIONER,

vs.

EMPRESA HONDURENA DE VAPORES, S.A.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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A (Filed endorsement omitted)

1 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EMPRESA HONDURENA DE VAPORES, S. A., *Plaintiff*,

against

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board, *Defendant*.

Complaint—Filed December 12, 1961

Plaintiff by its attorneys, White & Case, alleges upon information and belief:

1. The jurisdiction of this court is invoked under sections 1331 and 1337 of Title 28 of the United States Code.

The matter in controversy arises under the Constitution, the laws and a treaty of the United States hereinafter referred to and the matter in controversy exceeds the value of $10,000.00, exclusive of interest and costs.

2. Plaintiff is a corporation duly organized in 1941 under the laws of the Republic of Honduras, with its principal office and place of business at Puerto Cortes, Honduras. Its principal business is owning and/or operating 13 seagoing vessels which are registered under the laws of Honduras, fly the Honduran flag, are manned by unlicensed seamen employed in Honduras by plaintiff under Shipping Articles executed in Honduras. All but one of said seamen are citizens of Honduras and he is a subject of Great Britain.

3. Defendant is the Regional Director for the Second Region of the National Labor Relations Board created by Congress under Article 1 section 8 of the Constitution of the United States.

Said Second Region includes the County of New York, within the Southern District of New York.

Said defendant is charged with the responsibility of carrying out the orders of the National Labor Relations Board, pursuant to the Labor Management Relations Act, Chapter 7 of Title 29 of the United States Code.

4. On November 15, 1961 the National Labor Relations Board (the "Board") rendered its Decision and Direction

of Election in Case No. 2-RC-10739, United Fruit Company and National Maritime Union of America, AFL-CIO, in which proceeding the National Maritime Union of America, AFL-CIO, petitioned for an election among the unlicensed seamen employed on vessels owned and/or operated by plaintiff and time chartered to United Fruit Company. Plaintiff intervened as a party on the ground that it was the sole employer of said seamen. Said Decision and Direction of Election directed an election by secret ballot to be conducted by defendant among said employees. A copy of this Decision and Direction of Election as corrected and amended by the Board is attached as Exhibit 1.

5. On or about November 22, 1961, plaintiff's attorneys received a communication dated November 21, 1961 from the office of defendant, copy of which is attached as exhibit 2, informing plaintiff that a pre-election conference was to be held at the office of the Board, Second Region, 745 Fifth Avenue, New York, N. Y., on December 1, 1961 relating to the conduct of the election.

Such pre-election conference held on December 1, 1961 was adjourned until December 11, 1961. On December 11, 1961 plaintiff was informed that defendant would issue a notice on December 12, 1961 of the dates and times and the manner of the conduct of the elections to be held pursuant to the order of the Board among said employees of plaintiff. Defendant informed plaintiff that the election is scheduled to take place on December 17, 1961 on board vessels owned and/or operated by plaintiff upon their arrival in ports of the United States between December 17, 1961 and January 31, 1962 and by mailing ballots to said employees not aboard vessels scheduled to call at said United States ports between said dates.

6. Plaintiff is a wholly owned subsidiary of United Fruit Company, a New Jersey corporation. None of its officers or directors is employed by or associated with United Fruit Company and since its formation in 1941 all of its officers and directors have resided in Honduras.

7. Plaintiff owns ten of the seagoing vessels which it operates. It acts as agent for Balboa Shipping Company Inc., a Panamanian subsidiary of United Fruit Company, in the management and operation of three additional vessels

which are owned by Balboa Shipping Company Inc. These thirteen vessels (the "Vessels") are presently time chartered to United Fruit Company and call at various ports in Central and South America, the United States, Canada and Europe. All of them call regularly at Honduran ports for trade and renewal of Ship's Articles.

8. The Vessels are registered under the Honduran flag. Plaintiff has never owned or operated American flag ships.

9. The Republic of Honduras has a long established and comprehensive system of laws and regulations governing all aspects of the ownership and operation of vessels registered in Honduras and the employment of personnel thereon. Plaintiff is required to and does comply with these laws and regulations.

a. Each such vessel is required to carry on board a "Patente Definitiva de Navegacion" ("Patente") issued by the Republic of Honduras under signature of the Port Commandante of its home port (Puerto Cortes or Tela) evidencing ownership of said vessel. Such ownership is also inscribed in the Registry of Sea-going Vessels maintained by the Port Commandante.

Prior to the issuance of each Patente the owner must file in accordance with the requirements of the laws of the Republic of Honduras an application with the Republic of Honduras at Tegucigalpa enclosing with the application the bill of sale proving ownership of the vessel and must comply with certain other requirements under Title 2, Ley Organica de la Marina Mercante Nacional (1943).

b. Each such vessel is required to carry on board a safety equipment certificate issued by the Republic of Honduras, a navigation license, navigation log, crew roll, cash book, cargo book, compass log, tonnage certificate, load line certificate, charter party and a copy of the Commercial Code of Honduras and, if it carries radio equipment, the ship's station must be licensed by the Republic of Honduras and employ call letters and frequencies assigned by the Republic.

c. The officer personnel employed aboard such vessels must be licensed by the Honduran Government.

d. All unlicensed seamen in order to secure employment on such vessels of Honduran Registry are required to furnish a birth certificate, a Honduran passport, a Honduran seaman's identification book, the issuance of which is governed by Articles 56-64 of the Honduran Merchant Marine Act, a certificate of military inscription and a vaccination certificate. All unlicensed seamen are required to undergo physical examination by a physician and must secure a medical certificate signed by this physician and a Honduran health official.

e. Each such seaman is required before he leaves Honduras to sign the Ship's Articles maintained in accordance with Article 24 of the Honduran Merchant Marine Act which lists the name of each seaman, his age, marital status, place of birth, nationality, domicile and name and address of next of kin. The Ship's Articles are certified by the Port Commandante in Honduras.

10. Plaintiff employs approximately 335 unlicensed seaman upon the Vessels. All but one of these unlicensed seamen are citizens of the Republic of Honduras. The one non-Honduran citizen is a Jamaican and a subject of Great Britain. With four possible exceptions, all of the unlicensed seamen are residents of the Republic of Honduras.

11. United Fruit Company has no employer relationship whatever with any employee of plaintiff including seamen employees. Plaintiff has the sole and exclusive authority and control over all matters concerning terms and conditions of employment including hiring, firing, wages and discipline of employees.

12. Since 1941 the unlicensed seamen employed by plaintiff have been represented by Sociedad Nacional de Marineros de Honduras, a Honduran labor union recognized by the Republic of Honduras, as their collective bargaining agent. Collective bargaining agreements have been entered into between plaintiff and this collective bargaining agent since 1942. The agreement now in effect is dated March 29, 1957. With certain adjustments as to wages and related matters, this contract has been in effect at all times since said date and has been renewed by its terms until February 15, 1963. A copy and translation are attached as Exhibit 3.

All of said unlicensed seamen are members of Sociedad (the Union) in accordance with paragraph 3 of said agreement.

13. Under Honduran law plaintiff is required to recognize the Union as the exclusive bargaining agent of its unlicensed seamen.

Labor grievances concerning the unlicensed seamen employed by plaintiff are handled by representatives of plaintiff and the Union, including referral of such grievances to the Public Solicitor of the Ministry of Labor, the Labor Courts and to the Minister of Labor of Honduras.

14. Furthermore, under the laws of Honduras, the petitioner in Case No. 2-RC-10739, National Maritime
4 Union of America, AFL-CIO, (NMU) cannot gain recognition by the Honduran Government and could not lawfully represent plaintiff's said employees. Articles 490 and 504 of the Honduran Labor Code provide in translation as follows;

> "Article 490: No union may be permitted to act as such nor to exercise the functions prescribed to it by law or by its respective by-laws, nor to exercise its rights so long as it does not have recognition of its juridic personality, and may act as such only during the time it is so recognized."
>
> Atricle 504: "No union may function whose personnel is not composed of at least ninety per cent (90%) of Honduran citizens. No matter what is the form of direction of the union, no alien is eligible for directive posts."

NMU does not have Honduran recognition of its juridic personality nor are at least 90% of its personnel Honduran citizens.

15. Finally, plaintiff has received from the Government of Honduras an official ruling of its Ministry of Labor to the effect that the action of the Board in this case, in assuming jurisdiction over the plaintiff and its unlicensed seamen and in directing the election, is a violation of the sovereignty of the Republic of Honduras and null and void under its law. A translation of the said ruling is attached as Exhibit 4.

16. The Board had no jurisdiction to direct defendant to conduct an election among said employees of plaintiff and in so directing acted in excess of its powers. The Supreme Court of the United States held in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), that the Labor Management Relations Act of 1947 (Chapter 7, Title 29 of the United States Code) does not apply to labor relations between nationals of foreign countries operating vessels under foreign laws and their foreign workers.

17. In its Decision and Direction of Election the Board acted in violation of the Constitution of the United States.

a. Such action violates Article VI of the Constitution in contravening the provisions of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras dated December 7, 1927, 45 Stat. 2618 (1927). Article 10 of this treaty provides:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessel of the Party whose flag is flown."

b. Such action is in disregard of the principles of international law recognized and adhered to by the Department of State and violates Article II, section 2 of the Constitution by infringing upon the functions and powers granted to the Executive Department of the United States Government to conduct the foreign affairs of the United States.

c. Such action violates Article I, section 8 of the Constitution by exceeding powers granted to Congress thereunder, and

d. Such action violates Amendment V to the Constiution by depriving plaintiff of its "liberty, or property, without due process of law", in that it deprives plaintiff, a citizen of the Republic of Honduras, of its liberty to contract and, furthermore, impairs its rights under the existing collective bargaining agreement with the Union.

18. Plaintiff will suffer immediate and irreparable damage unless defendant, his agents, servants, employees, attorneys and all persons acting for and in concert with him are enjoind from conducting an election among the seamen employees of plaintiff in the following respects, among others:

a. Plaintiff will be denied the protection and rights granted to it under the laws and Constitution of the United States;

b. Plaintiff will be caused to violate its existing collective bargaining agreement with the Union and may be subjected to damages and other sanctions as a consequence thereof;

c. Plaintiff will be caused to violate the Honduran law requiring it to recognize the Union as the exclusive bargaining agent of plaintiff's seamen employees and may thereby be subjected to penalties and other sanctions under Honduran law; and

d. The operation of the Vessels will be impaired and plaintiff's relations with its seamen employees seriously disturbed and disrupted, all to plaintiff's loss and economic disadvantage.

19. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays judgment permanently enjoining the defendant, his agents, servants, employees, attorneys and all persons acting in concert with him from carrying out the Board's aforesaid Decision and Direction of Election dated November 15, 1961 and from conducting an election among plaintiff's said employees and granting such other and further relief as may be just and proper.

And plaintiff prays that an order be made temporarily enjoining during the pendency of this action the carrying out of the aforesaid Decision and Direction of Election and the holding of an election thereunder.

Dated December 12, 1961

WHITE & CASE
By /s/ ORISON S. MARDEN
A Member of the Firm.
Attorneys for Plaintiff,
14 Wall Street,
New York 5, N. Y.

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ORISON S. MARDEN, being duly sworn, says that he is one of the attorneys for the plaintiff in this action; that the foregoing complaint is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

This verification is made by deponent and not by an officer or director of the plaintiff because all of the plaintiff's officers and directors reside in the Republic of Honduras and none is presently within the United States. The sources of deponent's information and the grounds for his belief are the sworn record and exhibits in case No. 2-RC-10739 (United Fruit Company and National Maritime Union of America, A. F. L.-C. I. O.) before the National Labor Relations Board, which proceeding resulted in the Decision and Direction of Election dated November 15, 1961 under which defendant proposes to take the action herein sought to be enjoined and from information supplied to deponent by agents of plaintiff.

/s/ ORISON S. MARDEN

Sworn to before me
December 12, 1961

ROBERT A. PERKINS
Robert A. Perkins
Notary Public-State of New York
No. 41-832750-Queens County
Certificate filed in New York County
Term Expires March 30, 1962

7 **Exhibit 1 to Complaint**

184 NLRB No. 25 D-2594
New York, N. Y.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case No. 2-RC-10379

UNITED FRUIT COMPANY
and
NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

Decision and Direction of Election

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Jacob Lazarus, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record of this case,[1] the Board finds:

1. The Petitioner seeks a single fleet-wide unit of all unlicensed seamen employed aboard certain Honduran flag

[1] On May 31, 1960, the Board held a consolidated hearing for purposes of oral argument in *West India Fruit and Steamship Company, Inc.*, 130 NLRB No. 46, *Peninsular & Occidental Steamship Company*, 132 NLRB No. 2, and *Eastern Shipping Corporation*, 132 NLRB No. 72, on certain issues concerning the jurisdiction of the Act over ships flying the flags of nations other than the United States and concerning policy considerations involved in the Board's assertion of jurisdiction over such vessels. Similar issues are raised in this proceeding. Thus, as it appeared that United Fruit Company, the Petitioner, and Sociedad Nacional De Marinos Honduras, a Honduran organization, might have a substantial interest in the outcome of the *West India* and other cases referred to above, they were invited to participate as *amicus curiae* in the oral argument. Only the Petitioner accepted the invitation and appeared by counsel at the hearing. See *West India Fruit and Steamship Company*, *supra*, pp. 1-2, footnote 5.

As set forth in our decision in the *West India case*, supra, p. 2, fn. 4, the Attorney General of the United States was permitted to intervene in this and the other three cases referred to above and in his brief, filed on November 18, 1960, presented on behalf of the Department of State and Department of Defense certain considerations of international law and national defense policy bearing upon issues common to the four cases.

vessels which it alleges are beneficially owned and controlled by the United Fruit Company, here called UFCO, through its wholly owned foreign subsidiaries, Empresa Hondurena de Vapores, S.A.[2] and Balboa Shipping Corporation. UFCO contends that it is not, as alleged, the employer of the seamen involved and neither owns nor, as a time-charterer, operates the ships covered by the petition. Both UFCO and Empresa argue basically that as Empresa is a foreign corporation, is the employer of the seamen, and is engaged in its own business of operating and chartering the vessels, and as the vessels are of Honduran registry and the seamen or foreign nationality, the maritime operations involved are not within the jurisdiction of the Labor Act. Thus, the issue raised here concerns not only the effect upon the Act's jurisdiction of the foreign aspects adhering to Empresa's maritime operations, but also a determination of the relationship of Empresa and its operations to UFCO and its shipping trade.

As for the companies' arguments based upon the flag law and other international law doctrine and upon certain treaties and conventions between the United States and Honduras, such matters were dealt with at length in the Board's decision in *West India*. It was there concluded that the presence of such matters does not necessarily preclude the Act's coverage of a given maritime operation.[3] Similarly in the *Peninsular and Occidental*[4] and in the *Eastern Shipping*[5] cases it was held that the foreign incorporation of the legal owner and operator of a vessel and apparent employer of its crew did not alone take the vessel beyond the reach of the Act's jurisdiction.

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[2] Empresa Hondurena de Vapores, a Honduran Corporation, moved to intervene on the ground that it was the employer of the employees covered by the petition. Empresa was, without opposition, permitted to intervene at the hearing and has participated fully at all stages of this proceeding.

[3] The treaty and consular conventions with Honduras are substantially the same as those with Liberia considered in the *West India* decision at pp. 19-21.

[4] 132 NLRB No. 1, at 5.

[5] 132 NLRB No. 72, at 5-6.

However, none of these cases supports the proposition, in effect urged upon us here by the Petitioner, that underlying stock or other beneficial ownership and, thus, ultimate control of a foreign corporation and its operations by domestic United States interests necessarily bring the foreign corporation or its operations within the coverage of the Act. We do not read the Act as necessarily following United States investments abroad. It is the commerce of this nation, not of foreign nations, with which the Act is concerned. Also we are aware that international seaborne commerce will by its very nature involve insofar as this notion is concerned trade or transportation between foreign nations and a State. Nothing in the Act or relevant cases suggests, however, that all seaborne commerce reaching our ports on regular runs or sporadically is within the Act's coverage irrespective of other aspects of the operations.[6] In following the Supreme Court's *Lauritzen* decision,[7] the Board has pointed out that the test of jurisdiction given commerce literally within Section 2(6) is whether there exist substantial contacts between the "foreign" maritime operation and important United States interests.[8] Rather the problem is one of evaluating the many aspects of the operation and determining whether or not the shipping involved is essentially that of this nation and not that of a foreign nation which the exigencies of international trade have brought in contact with the United States.[9] Such a view clearly lends itself to the result that a foreign maritime operation can retain its essentially foreign nature and remain the commerce of a foreign nation outside the coverage of the

[6] See, *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U.S. 138 (1957); also, *Lauritzen* v. *Larsen*, 345 U.S. 571, 581 (1952).

[7] *Lauritzen* v. *Larsen, supra.*

[8] E.g., *West India, supra*, p. 15; *Eastern Shipping Corporation, supra*, at 2.

[9] *West India, supra*, 15; *Eastern Shipping Corporation, supra*, p. 6.

[10] Thus, in both the *Eastern Shipping* case at p. 5 and in *Hamilton Bros.*, 133 NLRB No. 85, p. 3, the Board noted in finding the Act applied that the U. S. contacts present were not just the result of the foreign-seaborne trade of a truly foreign venture.

Act despite underlying United States interests and certain commercial contacts with this country. At the same time, this view looks beyond the formal foreign aspects to determine if the maritime operation is in fact one primarily based in and operating out of the United States or essentially a adjunct of a domestic corporation's operations in the international trade of the United States, and, thus, is the shipping of this nation and, consequently, covered by the Act. It follows, as we emphasized in our *West India* decision (at pages 21 and 31) and as we reemphasize here, that the particular flag or nationality of the vessels involved, as such, plays no role in our determinations. Whether the flag or nationality be from our own hemisphere or across the seas, the controlling criteria are the same.

8a

It is in the light of these considerations that we must approach the facts and issues before us in deciding the jurisdictional question. UFCO is a New Jersey corporation with its principal place of business at Boston, Massachusetts. Of its approximately 8.7 million outstanding shares of stock, over 8.5 million are owned by citizens of the United States. Its business interests extend world-wide and involve a rather diverse group of activities. However, it is primarily concerned with the raising of bananas, sugar, cacao and other tropical produce and with their transportation to market and sale. The bulk of its trade is between Central and South American locations and United States ports, and the value of its imports into this country exceed one million dollars annually, and are carried in large part on ships either owned or chartered by UFCO, including those subject of the present petition.

Though it is an operating company, UFCO also to a large extent carries out its operations through some fifty to sixty subsidiaries, many of which are foreign corporations such as Empresa, the subsidiary involved in this proceeding. The primary purpose of UFCO's operating through subsidiaries is to achieve, as its vice-president explained in his testimony, a decentralized control of the companies' many activities in which the subsidiaries, more or less specializing in particular types of undertakings, deal with the day-to-day problems of their operations while over-all policy and development control resides in the parent com-

pany. The extent and nature of that control is the subject of sharp disagreement between the Petitioner and the companies. But the record shows that, though day-to-day operations are in fact handled by the subsidiaries themselves, long-range plans concerning expansion, contraction or other changes in the operation of subsidiaries are generally controlled by UFCO and its decision with respect to such matters is based not so much upon the needs or advancement of the subsidiaries as independent corporations, but rather upon the needs and planned development of UFCO's overall business in the production, transportation and sale of tropical produce.

Empresa is, as noted, one of UFCO's wholly-owned subsidiaries. It was organized under the laws of Honduras in 1941 by UFCO which supplied the capital for the venture. Empresa's officers are elected by its directors who are in turn elected by the sole stockholder, UFCO. There are, however, no interlocking directors with, or officers common to, Empresa and its parent. Furthermore, Empresa maintains all its own records, holds real estate in its own name, and otherwise appears to function as a distinct corporate entity. It is engaged in the business of owning and operating vessels registered under the laws of Honduras. However, it does not carry passengers or cargo on its own account. Rather, since its incorporation it has time chartered all its vessels and its income from its maritime operations, which exceed $400,000 annually, is derived wholly from the charter fees. But Empresa does not, as the record shows, hold itself out to the shipping world generally as being engaged in the business of chartering vessels. On the contrary, since its
9 formation its business has been limited with but a few possible exceptions[11] to chartering its vessels to UFCO, and the seventeen ships under its control at the

[11] It was stated in the record by several Company witnesses that Empresa chartered its vessels to UFCO and no other company. However, an exhibit shows that certain of the vessels had, on relatively rare occasions, been under charter to companies unrelated to UFCO; but, whether Empresa itself had so chartered the vessels or whether they were in fact rechartered by UFCO to the stranger companies does not appear. In either event, it remains clear that Empresa does not look to the general shipping market but rather to UFCO for the chartering of its vessels.

time of the hearing and which are the subject of the petition[12] were so chartered.

As the owner and operator of the vessels under time charter, Empresa must provide ships that are fully equipped and ready to put to sea. Thus, it is responsible not only for the physical condition of the ships[13] and for provisioning them,[14] except for fuel, but also for hiring the officers and crews[15] and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel.[16] There is nothing in the record to suggest that Empresa does not in fact carry out these typical responsibilities of the owner of a vessel under a time charter.

UFCO, as the time charterer of the vessels, determines what voyages they shall make, their ports of call, their length of stay in various ports, and what cargoes they shall carry. In exercising its control, UFCO deals directly with the captain of the vessel involved. If it is dissatisfied with

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[12] Empresa owned 14 of these vessels. Three were owned by Balboa Shipping Corporation, a Panamanian Corporation wholly owned by UFCO. Empresa is the managing agent of such vessels which, like its own ships, fly the Honduran flag. Balboa is not at this time directly involved with the operation of its three vessels which are, for all practical purposes, as fully under Empresa's control as are its own vessels. As Empresa's control over the vessels of Balboa appears to be the same as that over its own vessels, it is unnecessary for the purposes of this decision to distinguish between the two groups of vessels. We note, moreover, that it is not contended that jurisdiction over Balboa's vessels turns on factors other than those also applicable to Empresa and its vessels.

[13] Empresa is responsible not only for day-to-day upkeep of the vessels but also for having the ships drydocked and repaired. Both are usually done in the United States. However, betterments for vessels or the purchase and scrapping of vessels are matters usually falling within the over-all policy control of UFCO.

[14] Supplies are purchased both in foreign nations and the United States. Most of what it buys in this country is purchased from Maratrop Trading Corporation, a wholly owned UFCO subsidiary.

[15] The crews are hired in Honduras, are composed almost wholly of citizens of that country, and sign Honduran shipping articles.

[16] Empresa, as part of its control over personnel, has bargained with a Honduran organization as the representative of the crews of its vessels. See below, fn. 22.

the handling of a vessel by its officers or crew or with its mechanical or other condition, it directs its complaints directly to Empresa, which is responsible for making any necessary changes. The ships are used, for the most part, to carry produce of UFCO's Latin American operations,[17] and on any given trip may call at ports in various Central and South American countries including those of Honduras. As the bulk of the trade is between such countries and the United States, the vessels regularly call at the ports of this nation. On their return trips to Latin America the ships carry cargo for various UFCO subsidiaries and also general cargo for shippers and consignees outside the UFCO organization.

The record further shows that the Empresa vessels are wholly integrated in UFCO shipping operations. Thus, UFCO bareboat charters from one of its U. S. subsidiaires or owns outright a number of cargo ships registered under the laws of the United States. These ships, like Empresa's, are under the jurisdiction of UFCO's Marine Division, and the two groups of vessels are used interchangeably, carrying the same types of cargos and calling at the same ports, both domestic and foreign. In assigning a vessel to a particular run, the determination as to which vessel to use is based on its availability, size and speed, not on its ownership or flag.

The facts, outlined above, show that the maritime operations before us come literally within the Act's definition of commerce as they encompass in large part, transportation and trade between foreign countries and States of this nation. They further demonstrate that the relationship between UFCO and Empresa is one in which the affairs of the subsidiary are designed essentially to further the shipping operations of the parent and not one in which Empresa is considered an independent undertaking whose success or failure is gauged by its role in the open market. Supporting this conclusion are, *inter alia*, (1) that Empresa's capital expenditures and other substantial changes in operations are tied to UFCO's sea-going transportation needs, both present and projected, (2) that Empresa, with but few possible exceptions, time-charters its vessels to UFCO only and does not look to the open market for

[17] Some, if not all, of the ships also carry passengers.

business, and (3) that Empresa's vessels are utilized by UFCO as an integral and necessary part of its fleet of vessels and not chartered as an alternative to acquiring vessels elsewhere or only to meet particular contingencies that may arise.[18] Thus, the record shows that Empresa's maritime operations are a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation as described in Section 2(6) of the Act. It is also evident, and we find, that Empresa through its immediate authority and control over hiring and other terms and conditions of employment and UFCO through its control of Empresa and of the vessels and their operations are joint employers of the employees covered by the petition.[19]

We find, further, under the circumstances here that the maritime operations before us possess those substantial United States contacts which, under our decision in West India,[20] bring them within the jurisdictional coverage of the Act, despite the foreign registry of the vessels,

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[18] In the situation where it or its subsidiaries' vessels cannot meet its needs, UFCO charters vessels from outside its family of companies. Also, it might be noted here that, in its annual reports, UFCO refers to the vessels involved in this proceeding as its own vessels and notes that certain vessels for foreign flag operations were built to its specifications, and so forth. There is nothing in such reports to indicate that UFCO considers the foreign flag vessels to be other than its own or to be otherwise than completely under its control.

[19] In so finding, we are not holding that a time charterer of a vessel is necessarily a joint employer of the vessel's crew irrespective of the other attendant facts.

As Balboa Shipping Corporation does not operate its three vessels time chartered to UFCO and does not hire or otherwise deal with the seamen on such vessels or affect their terms and conditions of employment and as Empresa has, as noted, authority over such matters, Balboa is not under the present arrangement an employer of the seamen on its vessels.

[20] 130 NLRB No. 46, pg. 14-15. Clearly, the United States contacts derive from the fact that the maritime operations involved are those of a domestic corporation. They are not the result of the international operations of a truly independent foreign maritime venture.

10a Empresa's foreign incorporation, and the other foreign aspects present.[21] Accordingly, we conclude that Empresa and UFCO and their maritime operations subject of the petition are in, and affect, commerce within the meaning of Sections 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding. Thus, the companies' motions to dismiss on jurisdictional grounds are denied.

2. The labor organizations involved claim to represent certain employees of the Employers.[22]

3. A question affecting commerce exists concerning the representation of certain employees of the Employers within Section 9(c)(1) and Section 2(6) and (7) of the Act.[23]

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[21] See, also, *Peninsular & Occidental Steamship Co., supra; Eastern Shipping Corporation, supra;* and *Hamilton Bros., Inc., supra.*

[22] Following the close of the hearing in this case, Sindicato Maritimo Nacional De Honduras "Sindimar" sought to intervene in this proceeding on the basis of a card showing of interest. The Petitioner contends the request for intervention was not timely. We disagree, for the cards submitted in support of intervention were dated prior to the time of the close of the hearing. As we find that "Sindimar" is a labor organization, the motion to intervene is hereby granted. See, *Hamilton Bros. Inc.*, 133 NLRB No. . Sociedad Naccional De Marineros De Honduras was listed in the petition as the bargaining representative of the employees in the alleged appropriate unit and the record shows that, at the time of the hearing, a contract between Sociedad Naccional and Empresa covering the employees was then in effect. Copies of the petition, of the notice of hearing, and other formal papers were not served on Sociedad Naccional. However, on June 7, 1961, the Board issued a notice, served on the parties and Sociedad Naccional, in which, *inter alia*, it accorded that organization a right to intervene and state its position on the issues by filing within 25 days a "Statement of Intervention" and a brief. As Sociedad Naccional did not reply to the notice, we conclude it is not interested in being a party to this proceeding, and we therefore do not consider it to be one.

[23] We find contrary to the contention of Empresa that its contract with Sociedad Naccional in effect at the time the petition was filed but expiring in April 1961 is not a bar to this proceeding, assuming it would otherwise be so effective, because the decision herein is issuing after the expiration date of that contract. See: *St. Louis Independent Packing Company*, 122 NLRB 887, 889.

4. The following employees of the joint employers constitute a unit appropriate for the purposes of collective bargaining within Section 9(b) of the Act: all seamen employed upon the vessels owned or managed by Empresa Hondurena De Vapores, S. A., and jointly operated by the Employers, excluding guards, masters, other licensed officers, and all other supervisors.[24]

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11 DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they well ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by Na-

[24] The unit appears substantially as requested by the Petitioner. Empresa and UFCO did not contend the unit is inappropriate in either scope or composition, but object to the unit on the grounds considered above and found without merit, i.e., that UFCO is not an employer of the employees and that the Board is without jurisdiction in this case.

tional Maritime Union of America, AFL-CIO; or by Sindicato Maritimo Naccional De Honduras, "Sindimar;" or by neither.

Dated, Washington, D. C.

FRANK W. MCCULLOCH, Chairman
BOYD LEEDOM, Member
JOHN H. FANNING, Member
GERALD A. BROWN, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

PHILIP RAY RODGERS, MEMBER, dissenting:

For the reasons stated in my dissenting opinions in *West India Fruit and Steamship Company*, 130 NLRB No. 46, and *Hamilton Bros., Inc.*, 133 NLRB No. 85, I would dismiss the petition herein.

Dated, Washington, D. C.

PHILIP RAY RODGERS, Member
NATIONAL LABOR RELATIONS BOARD

11a **Exhibit 1 (Continued)**

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case No. 2-RC-10379

UNITED FRUIT COMPANY, Employer,

and

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, Petitioner.

Order Correcting Decision and Direction of Election

On November 15, 1961, the Board issued a Decision and Direction of Election[1] in the above-entitled proceeding from which there was an inadvertent ommission.

[1] 134 NLRB No. 25.

IT IS HEREBY ORDERED that the aforesaid Decision and Direction of Election be, and it hereby is, corrected by adding the sentence "Under such a test no single contact is decisive." to page 3, line 8, after the word "interests."

IT IS FURTHER ORDERED that the Decision and Direction of Election, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., November 30, 1961

By direction of the Board:

HOWARD W. KLEEB
Associate Executive Secretary

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12 **Exhibit 1 (Continued)**

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case No. 2-RC-10379

UNITED FRUIT COMPANY, Employer,

and

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner.

Order Amending Direction of Election

On November 15, 1961, the Board issued a Decision and Direction of Election[1] in the above-entitled proceeding and on November 30, 1961, an Order Correcting Decision and Direction of Election. Thereafter, having been advised by the Regional Director that a longer time in which to conduct the election is necessary, and having duly considered the matter,

IT IS HEREBY ORDERED that the Direction of Election be, and it hereby is, amended to provide for the conduct of the election at the discretion of the Regional Director.

Dated, Washington, D. C., December 5, 1961.

By direction of the Board:

HOWARD W. KLEEB
Associate Executive Secretary

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[1] 134 NLRB No. 25.

13 **Exhibit 2 to Complaint**

[SEAL]

NATIONAL LABOR RELATIONS BOARD
SECOND REGION
745 Fifth Avenue
New York 22, New York

Telephone Plaza 1-5500
November 21, 1961

Empresa Handurena de Vapores
Puerto Cortes
Honduras

Empresa Hondurena de
Vapores, S.A.
33 Rector St.
New York, New York
Re: United Fruit Company
Case No: 2-RC-10379

Gentlemen:

A conference will be held in my office on Friday, December 1, 1961, at 10:00 A.M., to arrange for the conduct of the election ordered by the Board in this matter.

Please be present and bring with you at that time a list of the employees who will be eligible to vote in accordance with the terms of the Direction of Election. This list should be in alphabetical order or in order of check numbers (including the clock number if the latter form is used), together with their job classifications, including employees who are ill, on vacation, or temporarily laid off.*

Very truly yours,

A. GENE NIRO
A. Gene Niro
Attorney

cc: White and Case
14 Wall St.
New York, N. Y.

Att: Orison S. Marden, Esq.

* NOTE: Also bring with you the date of arrival of the ships in U. S. ports aboard which employees in the unit are employed.

EMPRESA HONDURENA DE VAPORES, S.A. AUTHORIZED TRANSLATION OF COLLECTIVE CONTRACT FOR MARITIME WORK WITH SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS

EFFECTIVE APRIL 16, 1957

EMPRESA HONDURENA DE VAPORES, S.A.
AUTHORIZED TRANSLATION
COLLECTIVE CONTRACT FOR MARITIME WORK:

The undersigned, FRANCISCO COSENZA AREVALO, of age, married, merchant and residing in the Sectional District of Puerto Cortes, Department of Cortes, as party of the first part, acting in name and representation of the maritime workers association called "SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS", organized and existing under the laws of the Republic of Honduras, with head offices in Puerto Cortes, Department of Cortes, and recognized as a juridic person by the Executive Power in Acuerdo No. 1582 issued through the Ministry of the Interior, Justice, Sanitation and Public Welfare, under date of May 17, 1940; and Mr. Cosenza Arevalo acting as President of the Board of Directors of said Association and as its Representative, in accordance with the provisions of Article 27, Letter A) of its bylaws; and JOSEPH FELIX AYCOCK, of age, widower, Business Agent and with residence in the city of San Pedro Sula, D.D., Department of Cortes, as party of the second part, acting in name of and representation of the Corporation called "EMPRESA HONDURENA DE VAPORES, S.A." organized and existing under the laws of the Republic of Honduras, with head office in the port of Puerto Cortes, Department of Cortes, and recognized as a juridic person by the Executive Power in Acuerdo No. 1383 issued through the Ministry of the Interior, Justice, Sanitation and Public Welfare under date of March 28, 1941; and Mr. Aycock acting as President of the Board of Directors of said Corporation and as its legal representative, in accordance with the provisions of Article 26 of its bylaws; hereinafter the "Sociedad Nacional de Marineros de Honduras" shall be called "the Association" and the "Empresa Hondurena

de Vapores, S.A." shall be called "the Company"; and the parties Cosenza Arevalo and Aycock, in the name of their constituents, have agreed to enter into, as indeed by these presents they do enter into, the following collective contract for maritime work:

1. While this contract is in effect, the Company by these presents recognizes the Association as the sole representative of all seamen employed or to be employed on board the Honduran flag ships owned by, operated by, or for which the Company is agent, in all things pertaining to conditions of employment with the Company, or to the disputes, or controversies that may arise between said seamen and the Company regarding conditions of work on board the vessels or to the stipulation of this contract. Consequently all members of the Association that may be employed on the Company's ships shall be subject to and must comply with the stipulations of this contract.

2. This contract is applicable only to such seamen who are not required to put up a bond for the discharge of their duties or who do not hold on board a technical or professional position for the discharge of which a certificate of competence may be required, and therefore it shall not apply to the Captain and other Officers of the ship.

15 3. During the term of this contract the Company obligates itself to employ exclusively on board its ships, and the Association obligates itself to furnish seamen who are members of the association, after their status as such has been established, and who possess the required experience, knowledge and capacity for the performance of their duties on board; but if the Association does not have available or cannot furnish at any given moment the number of seamen of the specified qualifications requested by the Company, the latter may in that case employ seamen who are not members of the Association. It is also understood that this clause shall not hinder or restrict in any way the right which the Company has of reemploying and to continue employing and freely using such seamen who may return to work after an absence due to illness, accident, leave of absence or vacation.

4. Any seaman about to be employed on board the Company's ships shall have to be in good health and pass previ-

ously and successfully the medical examination prescribed by the Company, who may refuse employment to any seaman who, in the judgment of the Company's doctors may not possess the conditions of health necessary for the performance of the duties to be assigned to him on board.

5. During the life of this agreement the Company obligates itself to keep and maintain all of its vessels in a safe and seaworthy condition and at all times to maintain the lifesaving equipment, machinery, gear, and other equipment in good operating condition.

6. Whenever a Company's ship should be in a foreign port stranded or under repairs, or being cleaned, or for other reasons, and it should become necessary for these reasons to take her crew ashore, the Company agrees to continue paying to the members of the crew so landed their salaries as provided in Article 12 of this contract; and during the period that such members of the crew who are living ashore, the Company shall furnish them room and board at whatever appropriate place the Company may select, until such time as the ships shall be in condition to take the crew aboard, or until such time as such seamen shall be repatriated or transferred to the crew of another ship, whichever of these occurs first; it being understood that the Company shall have the option of giving in cash to each seaman in United States Currency, or its equivalent in Lempiras or in the currency prevailing in the place of payment, the cost of his room and/or board, which shall be per day per person the following:

a)	For Room Allowance	$3.00
b)	" Breakfast	1.25
c)	" Lunch	1.25
d)	" Supper	1.25

7. VENEREAL DISEASE: Whenever a member of the crew should be left on shore before the termination of his contract of engagement, for his medical treatment or hospitalization because he is impeded or unable to perform his duties on board the ship owing to some veneral or syphilitic disease, the Company shall have no obligation to support him or pay him any salary whatsoever while he remains on shore or during the duration of his illness, or while he

remains unable to perform his duties, or during the time after his recovery that he may have to wait to be re-employed on board; it being understood that if the Company should incur expenses for the board, lodging, treatment, hospitalization or medical attention of such seaman, such expenses shall be reimbursed by him to the Company in a proportion to be determined by the Company itself and through deductions that the Company shall make periodically from his salary.

Should the Company not re-employ such seaman, and he has been left on shore in a port other than the port of his engagement, it shall repatriate him as provided in Article 15 of this contract.

8. Every member of the association who is a member of the crew of any of the Company's ships shall at all times be under the orders of the Captain whose instructions and those of the officers of the ship he shall obey at all times. The Company may at any time dismiss any member of the crew whose services or conduct, in the judgment of the Company, may not be satisfactory, or if he should disobey the orders of the Captain and any other Officers of the ship, or for insubordination or disregard of the ship's discipline, without prejudice to other responsibilities to which he may be liable. In the event any seaman is so dismissed in a foreign port the Company shall repatriate him in the manner provided in Article 15 of this contract. Any member of the crew who considers that he has been unjustly dismissed may appeal the matter direct to the management of the Company. If the matter is not satisfactorily settled on this level, in such event, the matter shall be considered a dispute and must be handled and disposed of in the manner provided for in Article 11 of this contract.

9. Maritime Labor Accidents:

(a) It is agreed that any loss of life or any temporary or permanent incapacity that any seaman employed on Board a Company ship may sustain, while this contract is in effect, as a direct result of a maritime labor accident, shall be compensated by the Company in accordance with the provisions of Title XI of the Organic Law of the National Merchant Marine of Honduras (Decree No. 55 of

March 3, 1943.) It is further agreed that the accidents contemplated by this clause are those defined by Article 35 of said Law as maritime labor accidents.

(b) If a member of the crew, due to his temporary incapacity claimed by him to have been caused by an injury, wound or corporal infection classified as a maritime labor accident, stays or is left in port for his cure, medical attention or hospitalization, the Company shall pay him, pending investigation of such accident and while such seaman is on land receiving medical treatment, or waiting to be re-employed or repatriated, one-half of his monthly salary, (and also Four Lempiras (L. 4.00) per day for his maintenance and lodging during the time that he is not hospitalized). This payment shall end on the day that the incapacity is cured or declared to be a permanent one, or on the day that such seaman is re-employed or repatriated, whichever of these occurs first. If, as the result of the investigation, it is found that the incapacity in question was not caused by the alleged labor accident, and that the seaman is not entitled to the compensation provided in Article 44 of said Law, the seaman shall reimburse the Company the one-half monthly salary so paid him, such reimbursement to be made through periodic deductions that the Company shall make from the seaman's salary.

(c) If any member of the crew should lose his life as a result of such maritime labor accident, it is agreed that in the absence of a will left by such seaman designating a beneficiary of the death benefit provided in paragraph (d) of said Article 44 of Decree No. 55 of March 3, 1943, such death benefit shall be paid only to the legitimate or
17 aknowledged natural relatives of the seaman mentioned in numerals 1, 2, and 3 of said paragraph (d) of Article 44 of said Decree No. 55. Therefore, no such payment shall be made to the unrecognized natural descendants, ascendants, brothers or collateral relatives of the seaman.

(d) The Company may at its own option contract with private insurance companies for the payment of the compensations specified in the preceding paragraphs (a), (b) and (c), and if this should be arranged, the Company shall be relieved from the

obligation to pay said compensations, which shall then be paid directly by the insurance company engaged for the purpose.

10. The Company obligates itself to dismiss from its employ, upon termination of ship's voyage, any member of the crew, whom the Association may notify in writing that he is not an active member of the Association. The Association and the Company mutually agree that they will not discriminate against any man because of race, creed, or color.

11. It is agreed that during the term of this contract, there shall be no lockout ordered by the Company, nor declaration of strikes or suspension of work decreed by the Association or its members, on account of labor controveries or for any other causes. If any disputes or differences should arise between the contracting parties, it shall be resolved thus:

The matter in dispute shall be submitted to the decision of two arbitrator[s] of fact, one named by each party who shall be impowered to name a third in case of discord between said arbitrators. If any of the contracting parties should fail to name its arbitrator within ten days after being called upon to do so, or if the arbitrators named by the parties should not agree in naming a third, in that case the Commandant of the Honduran port of arrival of the ship shall make the appointment. The decision of the arbitrator of fact, or of the third in its case, shall be final and binding to the parties, and against it there shall be no appeal whatsoever, producing the effect of a firm sentence with the authority of "res judicata".

Any dispute arising during the voyage of a ship, shall be resolved in the manner prescribed in this article as soon as the vessel reaches a Honduran port, but if the vessel is not returning to Hunduras within a term of 60 days, then the dispute shall be submitted abroad to the decision of the Official or person designated by the Government of Honduras for that purpose, and his decision shall have the same final effect as the decisions of the aforesaid arbitrators of fact.

12. Wages: During the term of this contract, the Company shall pay to the rating listed below, when carried the

following monthly wages in United States Currency, or its equivalent in Lempiras or in the currency prevailing in the place of payment:

I. Deck Department

Carpenter	$160.00	
Boatswain	153.50	
Carpenter-Boatswain	160.00	
A. B. Seaman	140.00	
Ordinary Seaman	120.00	
*First Pumpman	166.00	
*Second Pumpman	153.50	
*Storekeeper	148.00	
*Painter	140.00	

* F. R. Hart only

18 II. Engine Department

Oiler	151.00	
Fireman for Oil Burning Vessels	140.00	
Wiper	125.00	
Utility Man	125.00	

III. Steward's Department

Chief Steward and Cook	$210.00	
Chief Cook	210.00	A
Chief Cook	196.00	B
Second Cook	160.00	
Baker	160.00	
Second Cook and Baker	175.00	C
Second Cook and Baker	162.00	D
Second Cook and Baker	156.00	E
Utilityman	125.00	
Endman	120.00	
Saloonman	132.00	
Officers' Messman	125.00	
Messman	120.00	
Messboy	115.00	

A—On the steamships *MUSA, PLATANO, IRIONA, LA PLAYA, AZTEC, TOLTEC, MAYA, MABAY, MANAQUI, COPAN, CHOLOMA, CHOLUTECA, F. R. HART, ALMIRANTE, ARAGON, ATENAS.*

B—On the steamships *LEMPA, LEON, TELDE, OROTAVA.*

C—On the steamships *IRIONA, AZTEC, TOLTEC, MAYA, MUSA, PLATANO, F. R. HART, PALMIRANTE, ARAGON, ATENAS.*

D—On the steamships *LA PLAYA, MABAY, MANAQUI, COPAN, CHOLOMA, CHOLUTECA.*

E—On the steamships *TELDE, OROTAVA, CUBAMA, LEMPA, LEON.*

These wages shall be paid from the day when the seaman signs the roll of the crew until the day his services cease on board. Any seaman who fails to sail with his ship at the specified time shall lose his rights to salary from that date.

13. VACATIONS: After one year of continuous service on the Company's vessels, the Company shall grant annually to each member of the crew enumerated in Clause 12 vacation with pay, thus:

(a) After the first year of continuous service, seven calendar days' vacation.

(b) After two years of continuous service the Company shall grant an annual vacation of fourteen calendar days.

(c) After five years of continuous service the Company shall grant an annual vacation of 21 calendar days.

(d) The continuity of services for the purposes of this article will not be considered interrupted by leaves of absence granted for sickness, accident or granted for other legitimate reasons nor for time lost due to lay-offs. Nevertheless said periods of absence from active service will not be counted in computing the year's service for the granting of vacations.

Said vacations may be accumulated up to a total not to exceed 28 calendar days, it being understood that the Com-

pany shall grant vacations at the time of the year most convenient to it, or when its maritime services permit.

19 14. ILLNESSES:

(a) NONOCCUPATIONAL AND NONCULPABLE ILLNESS: If any member of the crew should become ill on board the ship and he should be left on shore for his care, and if the illness is not occupational and does not proceed from a culpable act of the seaman himself, the Company shall pay him for its own account his medical, surgical, pharmaceutical and hospitalization expenses, (and also FOUR LEMPIRAS (L.4.00) per day for his maintenance and lodging during the time that he is not hospitalized), it being understood that the Company shall make these payments until the seaman is cured or until the illness is declared incurable or of a permanent character, or until the seaman is re-employed or repatriated, whichever of these occurs first, but in no case shall the Company make these payments when the illness proceeds from the culpable act of the seaman himself.

(b) OCCUPATIONAL ILLNESS: If a member of the crew should be left on shore due to his having contracted on board in the service of the ship an occupational illness not caused by his own fault, the Company shall pay him for its own account, while he remains ashore undergoing medical and hospital treatment, one-half of his monthly salary and also his medical, surgical, pharmaceutical and hospitalization expenses, (and in addition FOUR LEMPIRAS (L.4.00) per day for his maintenance and lodging during the time that the seaman is not hospitalized) until the seaman is cured and has been declared fit for duty, or until his occupational illness is declared incurable or of a permanent character, or until the day that such seaman is re-employed or repatriated, whichever of these occurs first, these payments to be continued in the event that such seaman is repatriated before he is cured or before his occupational illness is declared incurable or of

a permanent character. It is expressly understood that all of these payments shall be made in lieu of the benefits provided in paragraphs 1 and 2 of Article 42 of Decree No. 55 of March 3, 1943. Likewise if the occupational illness is declared incurable or of a permanent character, such crew member shall receive such benefits as are provided in Article 44 of said Decree No. 55, according to the degree of his permanent incapacity caused by such occupational illness.

For the purposes of this Article the term "occupational illness" shall be understood to mean any illness which a crew member may contract on board the ship as the immediate consequence and direct result of the work that he performs on board. Hence, any other illness not falling within this definition does not confer any rights to the benefits provided in this Article but are controlled by the provisions of Article 7 and paragraph (a) of Article 14 of this contract.

15. REPATRIATION: Whenever any member of the crew is left on shore, *in a port other than the port of engagement*, due to his illness, injury, discharge, shipwreck, or for any other cause, the Company shall repatriate him for its own account to the port of engagement, or to the port where the voyage began, or to the port which he and the Company may mutually agree upon. Such repatriation shall cover only the cost of transportation and maintenance of the seaman during the trip. If the seaman is able to work, the Company may discharge its obligation to repatriate him by providing him employment aboard any Company vessel proceeding to the port of repatriation.

16. HOURS OF WORK: The hours and working conditions for members of the crew shall be as follows:

(a) *Deck and Engine Department:*

The regular working hours for day workers will be eight hours per day, Monday through Friday and four hours on Saturdays in the forenoon, both at sea and in port. Overtime will be paid for any work in excess of eight hours per

day Monday through Friday, and work in excess of four hours on Saturday and for any work performed on Sunday or holidays, at the overtime rate stipulated in paragraph (a) of this article.

The regular working hours for men on watch shall be eight hours per day at sea and in port provided, however, that overtime will be paid for any work performed in any port on Saturday afternoon, Sundays, or Holidays at the overtime rate stipulated in paragraph (h) of this article.

(b) *Steward's Department:*

The regular working hours for members of the Steward's Department shall be eight hours daily in a spread of fourteen hours both at sea and in port provided, however, that any work performed in excess of such hours and any work performed in any port on Saturday afternoon, Sunday or Holidays shall be paid for at the overtime rate stipulated in paragraph (h) of this article.

(c) At sea and in ports other than Honduran and Continental U. S. Ports no work other than usual routine duties shall be performed on Sundays or Holidays.

(d) HOLIDAYS:

The following Holidays will be observed: January 1st, March 15th, April 14th, May 1st, September 15th, October 3rd, October 12th, December 25th, Holy Thursday, Good Friday, and Saturday of Holy Week.

(e) STEVEDORING CARGO:

Any work performed by members of the crew in connection with the stevedoring of cargo, will be paid for at the overtime rate stipulated in paragraph (h) of this article.

(f) DRILLS:

Boat and fire drills and other emergency work performed for the safety of the ship, its passengers, its crew or cargo or for the salvaging or aiding of other vessels in distress including their crew, passengers and/or cargoes shall not be considered overtime no matter when or where performed.

(g) COMPUTATION OF OVERTIME:

Ovrtime shall be computed on the basis of half-hour periods, it being understood that any fraction of half-hour shall be considered a full half-hour.

21 (h) OVERTIME RATE:

The overtime rate for all departments shall be ($1.00) one dollar per hour U. S. Currency or its equivalent in Lempiras or in the currency prevailing in the place of payment and the said overtime shall be paid in cash at the completion of each voyage.

(i) The Boatswain and or Carpenter shall perform the usual routine soundings and inspections on Saturdays, Sundays and Holidays without the payment of overtime.

(j) It is mutually understood and agreed that a vessel shall not be considered in port while at anchor. Nevertheless, when the vessel is anchored on a Saturday afternoon, a Sunday or on any of the holidays stipulated in section (d) of this article crew members will be paid for work done in accordance with sections (a) and (b) of this same article.

17. The purpose of the contracting parties in signing this contract is to continue working in complete harmony and cooperation for their mutual benefit, and principally to continue fomenting the development of the Honduran Merchant Marine to the end that it may occupy its proper place in the international maritime commerce.

18. Both parties being fully aware of the unsettled world-wide conditions and being desirous of protecting the interests and providing for the welfare of the seaman employed by the Empresa Hondurena de Vapores, S. A., in the event that the vessels owned by the Company should during the life of agreement, operate under war conditions, do agree that in that event the seaman employed on vessels operated by the Empresa Hondurena de Vapores, S. A., will be paid the identical bonuses percentage-wise and the identical compensation for death as a result of war hazard and or temporary and or permanent disability as a result of war hazard and loss of personal effects as are paid to seamen employed in the Merchant Marine of the United States.

During the period that any vessel of the Company is under charter to any agency of the United States Government, the members of the crew of such vessels, in lieu of the benefits mentioned in the paragraph above, shall be entitled to the bonuses and to the benefits for death, body injury, loss of personal effects and internment resulting from risk of war or war-like operations, as may during the term of such charter be provided with respect to the crews of vessels documented under the laws of the United States and under charter to any agency of the United States Government and during the period that the payment of such benefits are insured or assumed by the charterer, the Company shall be relieved of any and all liability to the members of the crew or their beneficiaries under the provisions of this agreement.

Whenever any of the foregoing contingencies should take place, the Empresa wil notify the Sociedad of such occurrences.

19. TERM OF CONTRACT:

This contract shall become effective at 12:01 A. M. April 16, 1957, and shall remain in full force and effect until midnight of April 15, 1959, and shall be considered automatically renewed for an equal term and so on successively if before 30 days prior to its expiration date one of the contracting parties has not notified in writing the other party its decision to terminate the contract; it being expressly agreed and understood that the contract entered into between the same contracting parties on April 11, 1955, is hereby terminated as of midnight April 15, 1957.

22 IN WITNESS WHEREOF, Mr. Francisco Cosenza Arevalo, in his character of President of the SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS and in accordance with the faculties vested in him by the by-laws of the said Sociedad in Capter 111, Article 27, Paragraph (eh) and Mr. Joseph Felix Aycock in his character of President of the EMPRESA HONDURENA DE VAPORES, S. A. duly authorized therefor, signed this contract before two witnesses, in the city of Puerto Cortes, Sectional District of Puerto Cortes, Depart-

ment of Cortes on the 29th day of March nineteen hundred and fifty seven:

J. F. Aycock
President of the
"Empresa Hondurena de Vapores, S. A."

F. Cosenza
President of the
"Sociedad Nacional de Marineros de Honduras"

Efrain Alcantara
Witness

F. B. Acosta
Witness

23 The undersigned Notary Public, with residence at the present time in the city of San Pedro Sula, D. D., Department of Cortes, and at present in this Port

Certifies: That the signatures which read: "J. F. Aycock" and "F. Cosenza", appearing at the end of the Collective contract for Maritime Work, entered into between the Empresa Hondurena de Vapores, S. A., and the Sociedad Nacional de Marineros de Honduras, are authentic and have been placed thereunto in his presence by Messrs. Joseph Felix Aycock and Francisco Cosenza Arevalo, in their character of Presidents, respectively of the aforesaid societies, and that they are personally known to him: and He Further Certifies: That the signatures which read "Efrain Alcantara" and "F. B. Acosta" and which likewise appear at the end of the aforesaid contract are authentic and have been placed thereunto in his presence by Messrs. Efrain Alcantara and Francisco B. Acosta whom he knows personally and who sign said document in their character of witnesses.

In Witness Whereof he signs and seals these presents in Puerto Cortes, Sectional District of the same name, Department of Cortes, on the 29th day of March nineteen hundred and fifty seven.

Guillermo Moncada
Notary

24 **Exhibit 3.**

Photostatic Copy of Spanish Text.

(Omitted in printing)

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43 **Exhibit 4 to Complaint.**

(Translation)

MINISTRY OF STATE
FOR
LABOR AND SOCIAL WELFARE

CERTIFICATION

THE UNDERSIGNED SECRETARY OF THE MINISTRY OF STATE FOR LABOR AND SOCIAL WELFARE in the action initiated by virtue of the petition presented to this Ministry of State by Mr. Joseph Felix Aycock, in his capacity as President of the Empresa Hondurena de Vapores, S.A., CERTIFIES: the opinion and decision literally state:

"The undersigned Chief of the Legal Section of the Office of the Inspector General of Labor in accordance with the preceding decision, hereby submits the following OPINION.— The Republic of Honduras is an Independent and Sovereign State with its own nationals and territory, legally established, subject to and obeying a Constitution and the laws and regulations derived therefrom and which in conjunction form the Honduran Judicial System. As a State which it is, it is Sovereign, a factor which is of extreme importance in International Law and which forms the fundamental basis for the opinion which is herein expressed, for as there is no other judicial power of a higher hierarchy than that of Sovereignty, there exists only the self-imposed limitations of the Individual States which gives a reason for the peaceful coexistence of these States within the Judicial System known as Public International Law. If this were not the case, it would be possible for the government of one nation, for example, to dictate unilaterally dispositions which could affect the sovereignty and jurisdiction of another state; which, in turn, and as reprisal, could dictate dispositions covering matters which legally pertain to the first and thereafter successively until the entire civilized

world would be transformed into a state of chaos due to constant tensions and innumerable wars, depending upon the power of some and the weakness of others, Fortunately, man has found the means of voluntarily imposing a limitation upon the Sovereignty of each State by means of international treaties, or simply by unilateral action under the existing laws. We have, therefore, Honduras, a civilized country, respectful of International Law which, in accordance with Article 11 of its Constitution has adopted and recognizes as its own the principles and practices of an international order which recognize the community of man and the sovereignty of nations and their desire for peace and universal democracy, and to such extent it would never presume to order the other Central American Republics to alter in any way their political status, the control over their people or their judicial institutions, or even to attempt to have their courts decide in any given manner matters over which they have jurisdiction, or even to attempt to take from the jurisdiction of these foreign courts matters which in accordance with their own jurisprudence, are wholly within their jurisdiction, and we could go on and on and mention many other instances of possible inferences in questions of International Jurisprudence which would only be limited by one's imagination. However, we repeat that man has found the solution to this problem because there exist internally laws which restrict the actions of each State, International Codes which resolve conflicts of law and finally International Conventions which proscribe the intervention of one State in the internal affairs of another, which condemn the theory of rule
44 by the strongest and raising to a very high plane the concepts of law and the peaceful solution of international controversies. Article 6 of the Constitution of the Republic of Honduras fixes the national territorial boundaries in such a detailed manner and conforms these with the decisions of arbitration commissions that the Honduran authorities charged with the enforcement of laws with regard to specific cases would never reach the extreme of usurping the rights and actions of other States by virtue of an error in political geography. The doctrine and conventions relating to private International Law, for example, the Bustamante Code, approved by the 6th Inter-

American Conference at Havana, Cuba, in 1928, refers to the following classification of laws. 'I. Those applying to persons by reason of their domicile or their nationality and following them even when they go to another country termed personal or of an internal public order; II. Those binding alike upon all persons residing in the territory, whether or not they are nationals termed *territorial, local or of an international public order;* III. Those applying only through the expression, interpretation, or presumption of the will of the parties or of one of them, termed voluntary or of a private order.' Private International Law recognizes among those laws which are classed as territorial the Political Constitutions and Labor Laws, in addition to criminal and administrative and procedural law; that is to say, these laws are applied equally to those who reside within the territory of the State in question without regard to nationality. This means that a worker or an employer domiciled in Honduras, even though they may be foreigners or have tried voluntarily to free themselves from the jurisdiction of the *territorial* laws of Honduras, cannot limit the celebration of a work contract to the laws of a foreign country. Much less can a foreign judicial body declare itself competent to consider a labor matter originating in Honduras, as we will demonstrate further on. It is established, therefore, that the provisions of a constitutional or labor character, among others, have the nature of being territorial laws and obligate all persons residing in Honduras without regard, as is reasonable, to the personal laws of individuals, under which it would be possible to grant the application of certain foreign legal provisions within the national territory, for example, those relative to the civil status of persons. As we are actually concerned with the substantive aspects of the problem presented by the Empresa Hondurena de Vapores, S.A., we will refer to the Charter of the Organization of American States subscribed to generally by all of these countries and specifically by the United States of America and the Republic of Honduras on April 30, 1948, in the City of Bogota, Republic of Colombia. In Article 5 of this Charter there is contained a reaffirmation of the principles by the American States and under paragraph b) of said Article they reaffirm that 'b) International order consists essentially of respect

for the personality, *sovereignty* and independency of States, *and the faithful fulfillment of obligations derived from treaties and other sources of international law.*' As an example of the limitation of the Rule by the Strong which distinguishes us today from those who lived in the dark ages of man; Article 6th of the Charter proclaims that 'States are juridically equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties. The rights of each State depend not upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law.' Strengthening the above principle, Article 7 of the Charter imposes the following obligation: 'Every American State has the duty to respect the rights enjoyed by every other State in accordance with international law', and in Article 8 the Charter states that 'The fundamental rights of States may not be impaired in any manner whatsoever.' We affirm that one of the fundamental rights of a modern state is its unrestricted rights with respect to its own legislative, administrative and judicial functions with respect to its own area and the validity of its laws. The above citations are enough to demonstrate the illegality of the action on the part of the National Labor Relations Board of the United States when it sought to exercise jurisdiction over a matter which is properly within the jurisdiction of Honduran Courts, in that without any logical reason whatever it ordered that the Empresa Hondurena de Vapores, S.A. recognize an American Maritime Union as the representatives of that Company for the negotiation and execution of a collective bargaining contract; however, we feel that it is our duty to study this matter further with respect to the Charter of Organization of American States and point out that its terms and conditions obligate all Nations of this Continent, whether they be large or small, strong or weak. We place specific emphasis on the following articles: 'Article 12. The jurisdiction of States within the limits of their national territory is exercised equally over all the inhabitants, whether nationals or aliens.' Article 15. 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also

any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.' As you can see, we have now reached the question of jurisdiction. Would the Government of the United States recognize as being legal the action by a Judge of the Republic of Honduras which would tend to bring under his jurisdiction matter X which properly should fall within the jurisdiction of the Courts of the United States? If by the mere fact that there are Honduran seamen who serve on ships which sail under the flags of the United States would this give to the Government of Honduras jurisdiction over labor matters involving these seamen, and would the Government of the United States consider it as being legal, realizing that its labor laws are territorial in nature and as a result applicable to the last inch of United States territory and to the ships which fly its flag for the reason that these ships are an extension of its national territory? We think that the answer would be in the negative and therefore it is reasonable to assume that the Government of Honduras would also refuse to accept as valid any decision handed down by any Court of any foreign country which attempts to apply to persons having their domicile in Honduras and who in accordance with the classification of laws above cited are subject to the jurisdiction of its territorial laws. The Constitution of the Republic, which is the source of International Law, establishes in Article 122 the jurisdiction over labor matters and states that it shall have jurisdiction over all controversies which originate as a result of the relations between capital and labor and states clearly that the respective laws shall establish the norms of this jurisdiction and the agencies which shall be responsible for putting them into effect. The law, has effectively established the jurisdiction over labor matters creating courts and tribunals necessary to mete out justice in labor matters. In the City of Puerto Cortes, situated in the Department of Cortes, which is a part of the national territory, there is a Labor Court and within its jurisdiction is the domicile of the Empresa Hondurena de Vapores, S.A., as well as the domicile of the seamen who work for this Company. Therefore, any controversies which arise between these parties are subject in accordance with the provisions of the

Constitution and the law, to said Labor Court. We
46 take into consideration that the ships of any nation actually constitute an extension of the national territory of that nation. We can show that the National Maritime Union of the United States under the provisions of the Labor Code in force in Honduras is not legally the representative of the workers of the Empresa Hondurena de Vapores, S.A., but we are not concerned with this matter, but merely wish to demonstrate, as we have demonstrated, the illegality of the resolution handed down by the National Labor Relations Board of the United States, based on the irrefutable argument that *it does not have jurisdiction over the matter which it has attempted to resolve*. As this 'Decision' stands, in the future the Government of the United States will have to recognize that all decisions handed down by the Courts or Tribunals of Honduras which involve conflicts between Honduran seamen on ships of the United States Merchant Marine shall be valid; this situation would merely be with respect to Honduras, for it is very easy to imagine that a like position could be taken by other countries stronger than Honduras and we feel certain that this would not be well received by the United States of America. The Bustamante Code, in Article 423, paragraph 3, establishes that 'Every civil or contentious administrative judgment rendered in one of the contracting States shall have force and may be executed in the others if it combines the following conditions: That the judgment *does not* conflict with the public policy or the public laws of the country in which its execution is sought.'. The resolution handed down by the National Labor Relations Board of the United States referred to in the petition of the Empresa Hondurena de Vapores, is in conflict with the Constitutional, Labor and Procedural Law of Honduras, which are all a matter of Public Law. In conclusion, we have reached the following opinion with respect to the Petition filed by the Empresa Hondurena de Vapores and state as follows: 1. That in accordance with the Labor Laws of Honduras a foreign Tribunal or agency cannot intervene in a labor matter which involves a Honduran shipping company and the seamen who work on its ships which fly the Honduran flag, as we consider that these ships are actually merely an extension of the national territory;

2. That no foreign union can represent the interests of seamen who work on ships sailing under the Honduran flag; 3. That any resolution or decision of a foreign tribunal or agency which conflicts with what has been expressed under 1 and 2 above, is null and void in accordance with the Honduran Constitutional, Labor and Procedural Law. Tegucigalpa, D. C., December 7, 1961. (Signed) ADALBERTO DISCUA R., Chief of the Legal Section of the Office of the Labor Inspector General.

"MINISTRY OF STATE FOR LABOR AND SOCIAL WELFARE. Tegucigalpa, Central District, December 8, 1961. I hereby approve in all parts the opinion handed down by the Legal Section of the Office of the Inspector General of Labor. Extend a certified copy to the interested parties. EXECUTED. OSCAR A. FLORES (Seal) Minister of State for Labor and Social Welfare. ANGEL LEVY CASTILLO Seal of the Secretary's Office."

Extended in Tegucigalpa, Central District, the 8th day of December 1961.

(SEAL)
ANGEL LEVY CASTILLO,
(SEAL) Secretary of the Ministry of Labor,
Approved
s OSCAR A. FLORES
Minister of Labor

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47 (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EMPRESA HONDURENA DE VAPORES, S.A., *Plaintiff*,

against

IVAN C. MCLEOD, Regional Director for the Second Region of the National Labor Relations Board, *Defendant*.

Order to Show Cause and Affidavit—December 12, 1961

61-4413

Upon the verified complaint herein and the affidavit of Orison S. Marden, sworn to December 12, 1961, it is

ORDERED, that the defendant show cause before this Court in Room 506, at the United States Courthouse, Foley

Square, New York, New York, on December 14, 1961, at 4:00 P.M., or as soon thereafter as counsel can be heard, why an order should not be made herein temporarily enjoining defendant, Ivan C. McLeod, Regional Director for the Second Region of the National Labor Relations Board, his agents, servants, employees, attorneys and all persons acting for and in concert with him, from carrying out a Decision and Direction of Election of the National Labor Relations Board made on November 15, 1961 directing a representative election among the unlicensed seamen employees of Empresa Hondurena de Vapores, S.A., a foreign corporation having its principal place of business at Puerto Cortes, Republic of Honduras, which election is presently scheduled to take place commencing on December 17, 1961 on board vessels owned and or operated by plaintiff upon their arrival in ports of the United States between December 17, 1961 and January 31, 1962, and by mailing ballots to said employees not aboard vessels scheduled to call at United States ports between said dates, to be returned to defendant at the office of the Board for the Second Region on or before February 15, 1962, pending the final hearing and determination of this action; and it is further

ORDERED that service of copies of this Order to Show Cause, the affidavit of Orison S. Marden, sworn to December 12, 1961 and the summons and complaint herein be made by a United States Marshal or Deputy, upon United States by delivery of copies thereof to the United States Attorney for the Southern District of New York and by sending copies thereof by registered mail to the Attorney General of the United States at Washington, District of Columbia, and upon defendant Ivan C. McLeod, Regional Director for the Southern Region of the National Labor Relations Board, or upon a person in charge of his office at 745 Fifth Avenue, New York, N. Y., on or before December 13, 1961, by 12:30 P.M. shall be deemed good and sufficient service.

Dated: New York, New York,
December 12, 1961

EDMUND L. PALMIERI
U. S. D. J.

48 **Affidavit of Orison S. Marden—December 12, 1961**

(Title omitted)

STATE OF NEW YORK }
CITY OF NEW YORK } ss.:

ORISON S. MARDEN, being duly sworn, says:

I am one of the attorneys for the plaintiff in this action and make this affidavit in support of an application by plaintiff for an order temporarily restraining and enjoining the defendant from carrying out a Decision and Direction of Election made by the National Labor Relations Board on November 15, 1961, pending the trial of this action.

This affidavit is made by me and not by an officer or director of plaintiff because all of plaintiff's officers and directors reside in the Republic of Honduras and none are now within the United States.

Except as stated below, I believe that the allegations of the complaint are based entirely on the sworn testimony and exhibits introduced at the proceeding before the National Labor Relations Board which resulted in the decision complained of. As will appear from the brief to be submitted in support of plaintiff's application, there is no dispute concerning the decisive facts which demonstrate that the Board was without jurisdiction to make the Decision and Direction of Election which defendant is carrying out.

The exceptions to the facts as presented in the record before the Board, relate to the number of merchant vessels owned by plaintiff and the number of unlicensed seamen employed thereon. Upon information and belief, plaintiff now owns and/or operates 13 seagoing vessels (as compared with 17 at the time of the hearing before the Board) and now employs approximately 335 unlicensed seamen (as compared with approximately 460 at the time of the hearing before the Board). These changes have occurred due to the sale, for scrap of 4 vessels which became obsolete. The sources of my information and grounds for my belief as to such changes are statements made to me by agents of the plaintiff.

In view of the fact that defendant has scheduled the election among plaintiff's employees commencing December 17, 1961, plaintiff requests this Court to grant an order

enjoining the defendant from carrying out the Decision and Direction of Election dated November 15, 1961 pending the trial of this action.

49 An order to show cause is requested for the reason that there will be insufficient time to give the regular notice of motion so as to bring on this application with expedition and before the commencement of the conduct of the election on December 17, 1961.

No previous application has been made for the relief requested in the attached order to show cause.

ORISON S. MARDEN
Orison S. Marden

Sworn to before me December 12, 1961.
ROBERT A. PERKINS
Robert A. Perkins
Notary Public, State of New York
No. 41-8327500, Queens County
Certificate filed in New York County
Term Expires March 30, 1962

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50 Certificate of service

(Omitted in printing)

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51 IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

61 Civ. 4413

EMPRESA HONDUREÑA DE VAPORES, S.A., *Plaintiff*,

v.

IVAN C. MCLEOD, as Regional Director of the Second Region of the NATIONAL LABOR RELATIONS BOARD, *Defendant*.

Motion of Defendant Regional Director to Dismiss the Complaint—December 13, 1961

Defendant, by his attorneys, moves that the complaint herein be dismissed for the following reasons:

1. This Court lacks jurisdiction over the subject matter of this action.

2. Plaintiff seeks premature judicial relief.

3. This Court lacks jurisdiction over the members of the Board who are indispensable parties to the action.

4. In any event, the Board's assertion of jurisdiction and its Decision and Direction of Election were proper.

WHEREFORE, it is respectfully requested that defendant's motion to dismiss be granted.

/s/ MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1717 Pennsylvania Avenue, N.W.
Washington 25, D. C.

Dated at Washington, D. C.,
this 13th day of December, 1961

(SEAL)

A True Copy,
HERBERT A. CHARLSON,
Clerk

By CATHERENE B. SALAMONE,
Deputy Clerk

(File endorsement omitted)

52 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

61 Civil 4413

EMPRESA HONDUREÑA DE VAPORES, S.A., *Plaintiff*,

against

IVAN C. McLEOD, as Regional Director of the Second Region of the NATIONAL LABOR RELATIONS BOARD, *Defendant*.

Opinion—December 16, 1961

PALMIERI, J.

This is a motion[1] for a preliminary injunction restraining defendant[2] from carrying out an order of the National Labor Relations Board (Board) directing a representation

election among the unlicensed seamen employees of Empresa Hondurena de Vapores, S.A. (Empresa). A complaint seeking permanent injunctive relief was filed simultaneously with the motion papers.

The election has been ordered to commence on December 17, 1961, on vessels owned or operated by plaintiff upon their arrival in United States ports and by mailing
53 ballots to employees not aboard vessels scheduled to arrive in the United States between December 17, 1961 and January 31, 1962. Plaintiff is a Honduras corporation, operating vessels registered under the laws of Honduras and carrying the Honduran flag. The unlicensed seamen employed by plaintiff are, with the exception of one who is a citizen of Jamaica, all citizens of Honduras and, with the exception of four, all residents of Honduras. All are also members of a Honduran labor union, Sociedad Nacional de Marineros de Honduras,[3] which is certified by the Ministry of Labor of Honduras. Empresa is, however, a wholly owner subsidiary of United Fruit Company (United Fruit), a New Jersey corporation with its principal place of business at Boston, Massachusetts. Since its formation of Empresa , with few possible exceptions, chartered all its vessels to United Fruit which uses them, for the most part, to carry produce of United Fruit's Latin American operations. It is the plaintiff's position that the Board, in making the order here in question, exceeded its powers under the Labor Management Relations Act of 1947, 29 U.S.C. Chapter 7, inasmuch as this Act has been
54 held by the Supreme Court of the United States[4] to be inapplicable to labor relations between nationals of foreign countries operating vessels under foreign laws and their foreign workers. The plaintiff urges, in addition, that the Board's direction that the representation election be held, presents a substantial Constitutional question: that such action is in contravention of treaty obligations with the Republic of Honduras and therefore violative of Article VI of the Constitution.[5]

The Jurisdiction of this Court to Grant the Relief Requested by the Plaintiff

At the very outset, it is necessary to consider the Board's objection that this Court lacks jurisdiction over the sub-

ject matter of this action. The objection is based upon the proposition that an employer is not entitled to invoke the jurisdiction of a federal district court to review the Board's direction of a representation election because an adequate and exclusive statutory method of obtaining judicial review by the appropriate Court of Appeals has been provided.[6] The plaintiff, on the other hand,
55 relies on the frequency cited and much discussed decisions in *Leedom* v. *Kyne*, 358 U.S. 184 (1958); and *Fay* v. *Douds*, 172 F. 2d 720 (2d Cir. 1949).

On the one hand there can be no doubt that the Labor Management Relations Act of 1947 manifested a clear Congressional recognition that to achieve the statute's basic policy of promoting collective bargaining dilatory litigation had to be avoided; that a restriction of the scope and method of review of labor determinations tended to achieve this result; and that such restriction tended to promote the efficient functioning of the Board as well.[7] Thus, it has come to be generally recognized that Board determinations in representation proceedings are not reviewable by district courts under their general equity jurisdiction.[8] But this generally settled rule is subject to two exceptions —those established by the two decisions upon which the plaintiff relies. The nature of these exceptions and their impact upon the general rule were succinctly explained by Judge Friendly in a recent opinion, *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127, 129-130 (2d Cir. 1960):

56 "Subsequently, two exceptions to this general rule excluding District Court jurisdiction to enjoin Board directions in representation matters have been recognized. The first was this Court's decision in *Fay* v. *Douds*, 2 Cir., 1949, 172 F. 2d 720, 723, relating to cases where the plaintiff advances a claim of denial of constitutional rights, in that case lack of procedural due process, which is 'not transparently frivolous.' Thereafter a second exception was announced, first by the Court of Appeals of the District of Columbia and later by the Supreme Court, in *Leedom* v. *Kyne*, 1957 101 U.S. App. D.C. 398, 249 F. 2d 490, 1958, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210, where the Board had acted in direct and in that case conceded contravention of a specific mandate of § 9, there § 9(b) (1)."

Since there is no claim here of the board's violation of any statutory mandate, the *Leedom* v. *Kyne* exception does not apply. But there is present in this case the assertion of the deprivation of several Constitutional rights. Only one need be referred to since it is plainly one which is "not transparently frivolous."[9] It is urged not only by the plaintiff, but by the Attorney General of the United States when he intervened before the Board in these proceedings as amicus. At page 11 of his brief he stated:

57 "A refusal to treat merchant vessels flying the flag of Liberia and Honduras as vessels of those nations would be in direct conflict with our treaty obligations and would, as the Under Secretary of State has pointed out in his letter of October 27, 1960, to the Attorney General, a copy of which is included as Appendix A, create serious difficulties in our foreign relations not only with nations signatory to these treaties but with other nations, such as Panama, which would be entitled to interpret a refusal to recognize the flag of the ship as a violation of the rules of international law upon which there had been mutual reliance."

Moreover, the Attorney General appended to his brief a communication from the Department of State signed by Under Secretary Douglas Dillon, dated October 27, 1960, expressing the Department's interest in these proceedings "based upon the important foreign relations considerations involved" and added, in part, as follows (p. 24 of Attorney General's brief):

"The Department of State believes that a proper reading of these Treaties requires that vessels under the flag of Liberia and Honduras and carrying the papers required by the national laws of those countries in proof of nationality, be recognized by the United States Government or any agency thereof as having the nationality of those countries. Therefore, the Department considers that any action by the Board purporting to consider such vessels as United States flag vessels, would be subject to a charge of violation of the above international agreements."

58 I cannot go so far as to say that a treaty violation may occur. It would seem sufficient, on the jurisdictional aspect of this case, to point out the formal assertions of important officials of the executive branch of the Government which tend to substantiate the plaintiff's claim on this point. I conclude, therefore, that there is present in this case one of the two grounds set forth by Judge Friendly permitting the assertion of jurisdiction by the District Court.

The Plaintiff's Entitlement to Injunctive Relief

Assuming the valid assertion of jurisdiction by the District Court, I shall now deal with the considerations affecting the disposition of plaintiff's request that it be granted threshold injunctive relief. At the outset, I am not convinced of the probability of the plaintiff's success in sustaining the legal contentions in this case. I am constrained to note that although the Attorney General intervened before the Board, he has been silent before this Court. It may be, as the Board urges, in its own behalf, that
59 the Attorney General believes that resort to the Court is, in any event, premature because the election sought to be enjoined is an interlocutory step in a representation proceeding, and it may lead nowhere if neither union wins. It is only if one of the two unions on the ballot wins, and it is certified by the Board as the collective bargaining representative that plaintiff will be placed under a legal obligation to bargain. And even in this contingency, the legal obligation is not enforceable until reviewed by the appropriate Court of Appeals as already stated. The plaintiff's assertions of immediate and irreparable damage by the holding of the election, without more, are unproved and unconvincing. It is not possible, on the record before me, to conclude that the plaintiff will suffer irreparable harm solely as a consequence of the holding of the election. I feel constrained to conclude that the interests of the many parties involved, particularly in the light of the lengthy and painstaking inquiry by the Board, do not justify the grant of the drastic threshold sanction invoked by the plaintiff.

60 Accordingly, the plaintiff's motion for a preliminary injunction is denied. It is so ordered.

Dated: New York, N.Y.
December 16, 1961.

/s/ EDMUND L. PALMIERI
U. S. D. J.

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[1] The motion was brought by an order to show cause submitted Wednesday and returnable late in the afternoon of the Thursday preceding the Sunday on which the election was scheduled to commence, thus giving adverse parties little time in which to respond and forcing the Court to decide the complex questions of jurisdiction and injunctive relief under pressure of severe time limitations. Considering that the Board issued its order on November 17, 1961, and the plaintiff knew elections were scheduled to commence within 30 days thereof, this long delay in bringing the motion is unfortunate, particularly since the time was found to prepare printed motion papers.

[2] Only the Regional Director of the Second Region of the National Labor Relations Board is named as a defendant. It is clear that his responsibilities entail only the mechanics of executing the Board's direction of election. Whether fully effective relief requires the Court's order to reach the Board itself, and whether the members of the Board are indispensable parties to the action, are questions unnecessary to determine, in view of what follows.

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[3] This Union did not permit its name to be placed on the ballot. Another Honduran union, Sindicato Maritimo Nacional de Honduras, "Sindimar", the National Maritime Union of America, AFL-CIO, and "no union", are the three choices offered by the proposed ballot.

[4] *Rey v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *cf. Ma. ie Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365 (1960); *Afran Transport Company v. National Maritime Union*, 169 F. Supp. 416 (1958); *Bobolakis v. Compania Panamena Maritima San Cristobal*, 168 F. Supp. 236, 238 (1958).

[5] Article VI of the Constitution provides, in pertinent part, as follows:

> "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . ."

Assuming there is a conflict between the Board's action, properly exercised pursuant to the labor Management Relations Act of

1947, that is to say, any action not contrary to any express statutory command of the Act and the Treaty of Friendship, Commerce, etc. between the United States and Honduras, dated December 7, 1927, 45 Stat. 2618 (1927), an interesting legal question is posed. It does not follow, however, that Congress' Constitutional powers are diminished by the prior treaty commitments of the United States. Since neither has intrinsic superiority over the other, the later Congressional enactment should prevail. *Leges posteriores priores contrarias abrogant* see *Edye* v. *Robertson* (*Head Money Cases*), 112 U.S. 580, 598-599 (1884); *Taylor* v. *Morton*, 3 Fed. Cas. No. 13,799 (1855); *cf. Cook* v. *United States*, 288 U.S. 102 (1933).

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[6] 49 Stat. 454 (1935) as amended, 29 U.S.C. § 160 (e), (f) (1952) provides that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals wherein the unfair labor practice in question was alleged to have been engaged in." This is the only provision for judicial review in the Act. The procedure for review of certification proceedings is set forth in § 9 (d) providing that whenever an order of the Board is made pursuant to an unfair labor practices hearing and there is a petition for enforcement or review of the order by the court of appeals, the Board's certification is to be included in the transcript, and the validity of the whole representation determination is then open to judicial examination.

[7] See the Legislative History of the Labor Management Relations Act, 1947, (G.P.O. 1948); *Leedom* v. *Kyne*, 358 U.S. 185, 191-194 (1958); *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 405-411 (1940); *Fitzgerald* v. *Douds*, 167 F. 2d 714, 716-717 (2d Cir. 1948).

[8] *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127 (2d Cir. 1960); *McLeod* v. *Local 176*, 288 F. 2d 198 (2d Cir. 1961); *Leedom* v. *International Brotherhood of Electrical Workers*, 278 F. 2d 237 (D.C. Cir. 1960); *National Biscuit Division* v. *Leedom*, 265 F. 2d 101 (D.C. Cir. 1959), *Cert. denied*, 359 U.S. 1011 (1959).

[9] This language is that of Judge Learned Hand, writing for the unanimous Court in *Fay* v. *Douds*, 172 F. 2d 720, 723 (2d Cir. 1949):

> "If this assertion of constitutional right is not transparently frivolous, it gave the District Court jurisdiction; and, having once acquired jurisdiction, the court might, and should, dispose of all other questions which arose, even though they would not have been independently justiciable."

(File endorsement omitted)

63. IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

61 Civil 4413

EMPRESA HONDURENA DE VAPORES, S.A., *Plaintiff*,

against

IVAN C. McLEOD, as Regional Director of the Second Region of the NATIONAL LABOR RELATIONS BOARD, *Defendant*.

Notice of Appeal—December 18, 1961

SIRS:

PLEASE TAKE NOTICE that plaintiff hereby appeals to the United States Court of Appeals for the Second Circuit, from the Order made by the Honorable Edmund L. Palmieri, United States District Judge, dated December 16, 1961 and filed with the Clerk of the United States District Court for the Southern District of New York on that date.

Yours, etc.

Dated, December 18, 1961.

WHITE & CASE
By ORISON S. MARDEN
a member of the firm
Attorneys for Plaintiff
14 Wall Street
New York 5, N. Y.

To:
STUART ROTHMAN, Esq.,
General Counsel,
National Labor Relations Board,
Washington, D. C.

SAMUEL M. KAYNARD, Esq.,
Regional Attorney, Second Region,
National Labor Relations Board,
745 Fifth Avenue
New York 22, N. Y.

Attorneys for Defendant

(File endorsement omitted)

64 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EMPRESA HONDURENA DE VAPORES, S.A., *Plaintiff*.

v.

IVAN C. MCLEOD, as Regional Director of the Second Region of the National Labor Relations Board, *Defendant*.

Order Denying Motion for a Stay Without Prejudice to Renewal—December 16, 1961

A motion having been made herein by counsel for plaintiff-appellant for a stay of a representation election by the National Labor Relations Board pending appeal from the decision of Judge Palmieri, dated December 16, 1961, denying plaintiff-appellant's motion for an injunction against the holding of said election,

UPON CONSIDERATION THEREOF, it is ordered that said motion be denied without prejudice to renew the said motion at any time in the future.

Dated that 16th day of December, 1961

THURGOOD MARSHALL
United States Circuit Judge

65 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

61 Civil 4413

EMPRESA HONDURENA DE VAPORES, S.A.,
Plaintiff-Appellant,
against
IVAN C. McLEOD, Regional Director for the Second Region of the NATIONAL LABOR RELATIONS BOARD,
Deefndant-Appellee.

Order to Show Cause—December 18, 1961.

Upon the annexed affidavit of ORISON S. MARDEN, sworn to December 18, 1961, it is

ORDERED that said defendant show cause before this Court in Room 1705 at the Federal Court House, Foley Square, New York City, on December 20, 1961, at 3:00 P.M. why an Order should not be made herein enjoining said defendant and all persons acting for or in concert or participation with him who receive actual notice of this Order by personal service or otherwise, from conducting a representation electing among plaintiff's unlicensed seamen until the hearing and determination of the appeal taken by plaintiff from an order made by the Honorable Edmund L. Palmieri dated December 16, 1961 denying plaintiff's motion for a preliminary injunction; and it is further

ORDERED that the hearing of the appeal taken by plaintiff be expedited and that the same be set for argument before this Court on the 20th day of December, 1961, at 3:00 P.M.

Service of a copy of this Order and the annexed affidavit of Orison S. Marden, sworn to December 18, 1961,
66 on Samuel M. Kaynard, Esq., one of the attorneys for the defendant in this action on or before December 18, 1961 at 4:00 P.M, shall be deemed sufficient.

Dated, December 18,1961

J. EDWARD LUMBARD
Chief Judge

67 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

61 Civil 4413

EMPRESA HONDURENA DE VAPORES, S. A.,
Plaintiff-Appellant,

against

IVAN C. McLEOD, Regional Director for the Second Region of the NATIONAL LABOR RELATIONS BOARD,
Defendant-Appellee.

Affidavit—December 18, 1961

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

ORISON S. MARDEN, being duly sworn, says:

I am one of the attorneys for plaintiff in this action.

This affidavit is submitted in support of the attached Order to Show Cause for a temporary restraining order enjoining defendant from conducting an election among plaintiff's unlicensed seamen employees until the hearing and determination of an appeal taken by plaintiff from an order made and filed by Honorable Edmund L. Palmieri, United States District Judge, dated December 16, 1961, denying plaintiff's motion for a preliminary injunction during the pendency of this action. On December 16, 1961, the Honorable Thurgood Marshall, Circuit Judge, denied a motion made by plaintiff for the relief requested herein but without prejudice to the renewal thereof.

While the original Decision and Direction of Election dated November 16, 1961 called for an election not
68 later than thirty (30) days after the date of said Order, said Order was amended on December 5, 1961 so as to provide "It is hereby Ordered that the Direction of Election be, and it hereby is, amended to provide for the conduct of the election at the discretion of the Regional Director."

According to a Notice of Election issued on December 12, 1961 and a Supplemental Notice dated December 12, 1961, balloting in connection with the election directed by the National Labor Relations Board to be conducted by defend-

ant is scheduled to take place on each of the vessels owned and/or operated by plaintiff upon their arrival in United States ports between December 17, 1961 and January 31, 1962, and balloting on board vessels not scheduled to arrive in United States ports between December 17, 1961, and January 31, 1962, will be by mail. The ballots are to be mailed by defendant on January 15, 1962 and are required to be returned by the close of business on February 15, 1962.

There will be submitted to the Court on this application, copies of the verified complaint in this action, the Order to Show Cause on plaintiff's application for an injunction pending trial, dated December 12, 1961, and the affidavit of Orison S. Marden sworn to December 12, 1961 submitted in support thereof.

By reason of the facts stated in the verified complaint and the law set forth in the brief submitted by plaintiff to Judge Palmieri, this Court respectfully requested to sign the attached Order.

69 The said order provides for expediting the hearing of the appeal taken by plaintiff and temporarily restrains defendant pending the hearing and determination of the appeal. Plaintiff is prepared to proceed forthwith with the argument of its appeal. No previous application has been made for the relief requested herein except as stated hereinabove.

ORISON S. MARDEN

Sworn to before me this 18th day of December, 1961

ROBERT A. PERKINS
Notary Public,
State of New York

70 (File endorsement omitted)

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71 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EMPRESA HONDURENA DE VAPORES, S. A.,
Plaintiff-Appellant,

v.

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board,
Defendant-Appellee.

Before LUMBARD, Chief Judge, FRIENDLY and MARSHALL, Circuit Judges.

Order for Stay—December 20, 1961

This appeal raises serious questions as to the power of the National Labor Relations Board to order an election, originally directed for December 17, 1961, but stayed by order of the District Court for the District of Columbia, on Honduran registered vessels, and as to the jurisdiction of the District Court to review it. The proceedings before the Board culminating in its order of November 15, 1961, lasted many months. The Government of Honduras through its ambassador has expressed concern over the Board's decision. Although normally we would not be disposed to find irreparable damage in the mere holding of an election, the international aspects of this case lead us to take a different view, especially in view of the lack of any showing that a postponement necessary to proper consideration of the case will be prejudicial. Accordingly we stay
72 the election pending our determination of this appeal.

Needless to say, this action on our part intimates no view how we will ultimately decide any of the serious issues here presented.

J. EDWARD LUMBARD
HENRY J. FRIENDLY
THURGOOD MARSHALL
U.S.C.JJ.

20 December 1961.

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73 (Filed endorsement omitted)

74 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 233—September Term, 1961.

Argued December 20, 1961

Docket No. 27314

EMPRESA HONDURENA DE VAPORES, S.A.,
Plaintiff-Appellant,

v.

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board,
Defendant-Appellee,

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Intervenor-Appellee.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and MARSHALL, *Circuit Judges.*

Plaintiff appeals from an order of the District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*, denying a motion to enjoin defendant, Regional Director of the National Labor Relations Board, *pendente lite* from conducting a representation election on plaintiff's Honduran registered vessels. Reversed.

75. ORISON S. MARDEN (White & Case), New York, New York (Chester Bordeau and William D. Conwell, of Counsel), *for Plaintiff-Appellant.*

ALLAN I. MENDELSOHN (Stuart Rothman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington, D. C., and Samuel M. Kaynard, Regional Attorney, New York, New York), *for Defendant-Appellee.*

HERMAN E. COOPER, New York, New York, *for Intervenor-Appellee.*

ALFRED A. GIARDINO, New York, New York, *for United Fruit Company.*

Opinion—January 12, 1962

FRIENDLY, *Circuit Judge:*

The complaint of Empresa Hondurena de Vapores, S.A., hereafter Empresa, against the Regional Director of the National Labor Relations Board, filed in the District Court for the Southern District of New York on December 12, 1961, made allegations which we summarize as follows:

(1) Empresa is a Honduran corporation, organized in 1941, with its principal office and place of business in Puerto Cortes, Honduras. It operates thirteen seagoing vessels, ten of which it owns and three of which are owned by Balboa Shipping Company, Inc., a Panamanian corporation, which, like plaintiff, is a wholly owned subsidiary of United Fruit Company, a New Jersey corporation. All the
76 vessels are registered under the laws of Honduras and fly the Honduran flag.

(2) The vessels are manned by unlicensed seamen, some 335 in number, all but one of whom are citizens of Honduras (the one being a British subject), employed in Honduras under Shipping Articles executed there. The vessels, all of which are time-chartered to United Fruit, ply between ports in Central and South America, the United States, Canada and Europe; all of them call regularly at Honduran ports for trade and renewal of Ship's Articles. Since 1941 the seamen have been represented by Sociedad Nacional de Marineros de Honduras, a Honduran labor union recognized by the Republic of Honduras, hereafter Marineros, as their collective bargaining agent. A collective bargaining agreement between Empresa and Marineros was made in 1957, to remain effective until April 15, 1959, and thereafter to be automatically renewed for successive two year terms in the absence of contrary notice; it now stands renewed until February 15, 1963. Honduras "has a long established and comprehensive system of laws and regulations governing all aspects of the ownership and operation of vessels registered in Honduras and the employment of personnel thereon"; under that law plaintiff is required to recognize Marineros as the exclusive bargaining agent of its unlicensed seamen, and labor grievances are handled by representatives of plaintiff and Marineros subject to the Ministry of Labor and the Labor Courts of Honduras.

(3) On November 15, 1961, the NLRB rendered a Decision and Direction of Election, 134 NLRB No. 25, which, as later modified, instructed the defendant Regional Director to conduct an election among plaintiff's seamen to determine whether they desired to be represented for collective bargaining purposes by National Maritime Union, AFL-CIO, by Sindicato Maritimo Nacional de Hon-
77 duras ("Sindimar"), or by neither.[1] The Honduran Labor Code prohibits the exercise of functions by a union "so long as it does not have recognition of its juridic personality" or if its personnel is not at least 90% Honduran; National Maritime Union fails on both counts. Defendant has informed plaintiff that the election is to take place, beginning December 17, 1961, on board vessels arriving in United States ports between December 17, 1961 and January 31, 1962, and by mailing ballots to employees on vessels not so scheduled.

Alleging that the Board's direction violated Article 10 of the Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618,[2] as well as the Constitution of the United States and principles of international law, plaintiff sought temporary and permanent injunctive relief. By order to show cause signed December 12, 1961, on an affidavit of counsel incorporating the allegations of the complaint, the motion for a temporary injunction was brought on for hearing before Judge Palmieri on December 14. The Regional Director moved to dismiss. He asserted that the District Court lacked jurisdiction over a direction for an election, that the request for relief was premature, that the members of the NLRB were indispensable parties defendant, and that in any event the Board's action was proper.

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[1] The Board's decision states that Marineros was notified the Board would grant it a right to intervene but did not reply.

[2] This states:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessel of the Party whose flag is flown."

78 Relevant to the last contention are certain additional facts stated in the Board's opinion and not challenged before us: United Fruit Company is predominantly United States owned. The bulk of its trade is between Central and South American countries which grow bananas and other tropical produce, and the United States. Empresa's officers are elected by its directors who are elected by United Fruit, and Empresa has always time-chartered all its vessels, almost entirely to United Fruit. However, Empresa "appears to function as a distinct corporate entity," and "There is nothing in the record to suggest that Empresa does not in fact carry out * * * typical responsibilities of the owner of a vessel under a time charter," including "hiring the officers and crews and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel."[3] On the other hand, United Fruit determines the routing of Empresa's ships, communicating its desires and complaints to the captain or to some other officer of Empresa. The vessels regularly call at United States ports, carrying United Fruit cargo on inbound and outbound voyages and also general cargo on the latter; some of the ships also carry passengers. Empresa's vessels are used by United Fruit in the same manner as other chartered or owned vessels registered under United States law.

It should be observed also that the Attorney General, acting at the request of the Departments of State and Defense, was permitted to appear as *amicus curiae* before the Board in this and related cases. Although the Attorney General's brief to the Board stated that it was not its "purpose * * * to support or oppose the position of the
79 steamship companies or the position of the unions" (p. 2), it advanced (pp. 15-20) a list of proposed "principles to be applied in determining whether a vessel and its crew shall be deemed foreign and thus beyond the scope of the Act," and "submitted * * * that the flag, as a ready, recognizable, and accepted standard must be preferred pragmatically to any other and that in accordance with that standard, the indirect financial interest of Ameri-

[3] In view of these and other specific findings of fact we consider the Board's statement that United Fruit is a "joint employer" to be an erroneous legal conclusion, which must be disregarded.

can citizens in a foreign registered ship may not deprive a vessel of its status as a national of the country whose flag is flown."

Despite the time pressure created by plaintiff's failure to bring this action until almost the eve of the scheduled election, Judge Palmieri prepared a thoughtful opinion, filed on December 16. Holding that the District Court had jurisdiction of the subject matter since, as he believed, plaintiff had made a colorable allegation of denial of constitutional rights, see *Fay* v. *Douds*, 172 F. 2d 720, 723 (2 Cir. 1949), he nevertheless denied the injunction since he was not convinced of the probability of plaintiff's success or by its claims of irreparable damage from the election. He therefore deemed it unnecessary to decide at that time whether the members of the Board were indispensable parties.

Although a motion for a stay pending appeal was initially denied, the appeal itself was argued on December 20. Meanwhile the election had been stayed as the result of a temporary restraining order issued by the District Court for the District of Columbia in an action by Marineros against the members of the Board. The argument having convinced us that the case presented serious issues involving the relations of the United States with a foreign government and that no irreparable damage would be caused by a brief delay of the election, we then issued a stay pending determination of the appeal. We have reached a conclusion different from that of the District Judge.

80 Two other circumstances must be mentioned before we proceed further: Under date of December 15, 1961, the Department of State, through its Legal Adviser, forwarded to Judge Palmieri, without comment, a note dated November 29, 1961, from the Ambassador of Honduras, protesting against the Board's decision, which was claimed to violate Articles 10 and 22 of the Treaty of Friendship, Commerce and Consular Rights,[4] to involve an

[4] Article 22 provides that "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have

intrusion by the United States into an area exclusively occupied by Honduras, and to infringe established principles of international law; the communication did not reach Judge Palmieri until December 18, after his decision had been filed. On January 10, 1962, the Department of Justice submitted to the District Court for the District of Columbia a letter saying that although the Department of State "does no support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case."

I. *The jurisdiction of the District Court.*

(1) Although the issue has not been raised, we must first consider whether the complaint, invoking 28 U. S. C. §§ 1331 and 1337, set forth a claim cognizable by a Federal district court, *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934).

As subsequent discussion will show, the complaint advanced a claim arising under a treaty sufficient to come within § 1331, whether or not the claim was meritori-
81 ous; the difficulty with respect to § 1331 is jurisdictional amount. When a plaintiff asserts the right to be free from regulation, "The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed." *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 181 (1936). Here the complaint alleged that "the matter in controversy exceeds the value of $10,000, exclusive of interest and costs," but no facts were pleaded to substantiate this, and it is not obvious that an election alone would cause damage in that amount. Hence, if the allegation had been put in issue, as it was in the *McNutt* case and in *K V O S, Inc.* v. *Associated Press*, 299 U.S. 269 (1936), and plaintiff had not supported it, Federal jurisdiction under § 1331 could not be sustained. However, no such traverse was made and the allegation was not so clearly baseless that the court was bound to disregard it even in the absence of challenge, although the court "might, of its own motion, have entered upon an inquiry to ascertain whether the cause was one

entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit."

over which it had jurisdiction," *K V O S, Inc.* v. *Associated Press, supra,* at 277.

Moreover, we think the complaint asserted a claim under § 1337, giving district courts jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce * * *," without regard to the amount in controversy. The National Labor Relations Act is such an Act, *American Federation of Labor* v. *Watson,* 327 U.S. 582 (1946); *Capital Service, Inc.* v. *NLRB,* 347 U.S. 501 (1954); the question is whether the action here is one "arising under" it. In support of a negative answer it could be said that what plaintiff is asserting is a right to be free from the Act, not a right allegedly conferred by it. But § 1337, like § 1331, speaks not of a claim created by, but of an action arising under, an act regulating commerce;

82 it would run counter both to the language and to the policy underlying the statute to hold that the jurisdictional grant did not include an action whose sole purpose is to challenge an order of a Federal agency sought to be justified by a Federal statute. Whatever might earlier have been thought because of language in *American Well Works Co.* v. *Lane & Bowler Co.,* 241 U.S. 257, 260 (1916), the later decision in *Smith* v. *Kansas City Title & Trust Co.,* 255 U.S. 180 (1921), seems to have crossed that bridge, see *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.,* 348 U.S. 437, 450 (1955); cases such as *Louisville & Nashville R.R.* v. *Mottley,* 211 U.S. 149 (1908), are distinguishable in that the action was to enforce a claim arising under state law, there a right under a contract, with the Federal statute a matter of defense, see also *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667, 672 (1950), whereas here, as in *Smith,* it is the proposed application of the Federal statute alone that gives rise to the action. We do not pretend the distinction to be altogether clear or satisfying; but if one line of cases or the other has to be favored, considerations of good sense support those permitting the sphere of application of Federal statutes to be determined by Federal Courts.[3]

[3] Professor Mishkin believes it now to be settled "that an action for a judgment declaring the non-existence of such a federally created right in the other party also falls within the federal ques-

83 (2) The next problem as to the jurisdiction of the District Court is presented by the first two grounds of defendant's motion to dismiss, best considered together, namely, that the court has no power to enjoin an order for an election, especially at the suit of the employer, and that plaintiff's resort to the courts is premature.

In *Local 1545, United Brotherhood of Carpenters* v. *Vincent*, 286 F. 2d 127 (2 Cir. 1960), we stated that District

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tion statute." The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 179 (1953).

We have not overlooked that the action here is against a Federal officer—a circumstance which one feels ought make a difference but apparently, under existing statutes, doesn't. Simply as a matter of language it might be argued that if jurisdiction under 28 U.S.C. § 1331 fails for lack of the required amount, the action would come within 28 U.S.C. § 1346(a)(2) giving the district courts jurisdiction over "Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department * * *" But, apart from the inconsistency that one contention would assert the suit to be against the United States whereas the other would deny it, and the question whether § 1346(a)(2), the successor of the Tucker Act, 24 Stat. 505 (1887), authorizes an injunction, see *United States* v. *Jones*, 131 U.S. 1 (1889); cf. *Hatahley* v. *United States*, 351 U.S. 173, 182 (1956), the argument would fail on the basis that "where the officers' powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). An authority on the subject says, with respect to such suits against federal officers, that "Apart from situations where a method of judicial review is particularly prescribed by statute, the only grant of jurisdiction that includes such cases is that in matters 'arising under' the Constitution or the laws. This mode of treatment includes limitations, such as jurisdictional amount and the rule that federal questions must appear without anticipation of defenses, that have no place in actions against federal officials, which are necessarily of federal concern." Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemporary Problems 216, 220 (1948). *Deering, Milliken, Inc.* v. *Johnston*, —— F. 2d ——, —— (4 Cir. 1961), might suggest that § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e), could serve here as a special statutory provision such as Profesor Wechsler mentions, but that would require us to decide whether the NLRB's direction of election constituted "final agency action" within the meaning of that Act.

Court jurisdiction to enjoin Board directions in representation matters had been recognized in two types of cases, namely, (i) where plaintiff made an assertion, "not transparently frivolous," that failure to enjoin would deny rights guaranteed by the Constitution, *Fay* v. *Douds*, 172 F. 2d 720, 723 (2 Cir. 1949), and (ii) where the Board had acted in plain contravention of a specific mandate of the Act, *Leedom* v. *Kyne*, 249 F. 2d 490 (D.C. Cir. 1957),
84 aff'd 358 U.S. 184 (1958). The instant case does not come within the second exception; although we conclude that the Board erred, its error was far from "plain," *International Assn. of Tool Craftsmen* v. *Leedom*, 276 F. 2d 514, 516 (D.C. Cir. 1960). Neither, with all respect to the learned District Judge, do we think it came within the first. Assuming as we do that the claim that the Board's action violated Article 10 of the 1927 Treaty with Honduras, see fn. 2, was "not transparently frivolous," a claim that such action violated any constitutional rights of plaintiff would be. For, apart from the uncertainty how far a treaty confers rights upon nationals of the foreign state as distinguished from the state itself, see American Law Institute, Restatement of the Foreign Relations Law of the United States, Tent. Draft No. 5, §§ 109 and 110; cf. *Asakura* v. *Seattle*, 265 U.S. 332 (1924) and 28 U. S. C. § 1350, the Constitution does not prohibit Congress from legislating in violation of a treaty, *The Cherokee Tobacco*, 11 Wall. 616 (1870); *Head Money Cases*, 112 U.S. 580, 597-600 (1884), or directing its delegate to that end. On the other hand, the courts will not assume such a purpose on the part of Congress unless "clearly expressed," *Cook* v. *United States*, 288 U.S. 102, 119-120 (1933); *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888)—for one reason because such a violation would involve the United States in a claim for breach of its international obligation; Restatement of the Foreign Relations Law of the United States, Tent. Draft No. 3, § 128. Any benefit plaintiff takes from the Treaty thus goes to statutory interpretation, not to constitutional right.

However, the failure of the complaint to come within either of the categories of actions to enjoin representation orders that have heretofore been sustained is not fatal;

the book has not been closed all time. *Leedom* v.
85 *Kyne*, *supra*, must be taken to have determined that, whatever may be the case with respect to orders of the National Mediation Board as to bargaining units, see *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943); *U N A Chapter; Flight Engineers International Assn.* v. *National Mediation Board*, 294 F. 2d 905 (D.C. Cir. 1961), cert. denied, —— U.S. —— (1962), representation orders of the NLRB have not been vested with complete immunity from injunction, either by inferences from the National Labor Relations Act or on the principle of *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41 (1938). Once that step has been taken, the courts must make up their minds, as best they can, whether in a particular type of case Congress would or would not have wished them to intervene against "agency action taken in excess of delegated powers," 358 U.S. at 190. The considerations as to delay from judicial intervention, persuasively marshalled in Mr. Justice Brennan's dissent for Mr. Justice Frankfurter and himself in *Leedom* v. *Kyne*, *supra*, at 191-196, argue for a negative answer in the usual case, having purely domestic significance, where the Board is alleged to have acted wrongly, although not plainly so; hence we gave such an answer in the *Local 1545* case and in *McLeod* v. *Local 476*, 288 F. 2d 198 (2 Cir. 1961), as the Court of Appeals for the District of Columbia has done in numerous cases cited in the *Local 1545* opinion.[6] An altogether different situation is presented when, as here, there is a substantial claim that the Board is exceeding its jurisdiction in the field of foreign relations and is thereby offending a
86 friendly foreign government; we cannot believe Congress would have wished to limit the role of the courts in that situation to cases where the Board had violated a "clear statutory command," *Leedom* v. *Norwich*,

[6] We take it that the point of the "plain contravention" requirement is to close the doors of the courts at the very outset to actions for injunctions in representation matters, which, though ultimately found unmeritorious, would have accomplished much of their objective by the very time required for judicial consideration. An inevitable corollary of the requirement is that a court must sometimes refuse to entertain a complaint asserting what it regards as a valid claim.

Connecticut Printing Specialties and Paper Products Union, 275 F. 2d 628 (D.C. Cir.), cert. denied, 362 U.S. 969 (1960), as against a command not so clear. Not only is the case in favor of judicial action stronger than in the typical domestic representation dispute, but the practical objections against it are weaker. Here the Board is entering a new and sensitive area of activity; while we do not assert that its jurisdiction with respect to foreign flag ships is to be decided on an all or nothing basis, the significant variations among the fact patterns are sufficiently few that guidelines ought soon be pricked out by the courts[7]—failing the more desirable solution of new legislation—and the problem will thus not be a constantly recurring one.

Assuming that the principle of *Leedom* v. *Kyne* may be thus extended in a proper case, two further problems must be faced. One is that here the suit is by the employer who, arguably, is sufficiently protected by the possibility of sitting out the election and certification, continuing to recognize the existing union, awaiting the filing of an unfair labor practice charge for so doing, and, when held for this, bringing the direction of election before a court of appeals, as provided in § 9(d) of the Act, on enforcement or review proceedings under § 10(f). The second is that, unlike *Leedom* v. *Kyne*, the instant action was brought to enjoin an election rather than a certification. See Cox, The Major Labor Decisions of the Supreme Court, October Term 1958, reprinted in Gellhorn and Byse, Administrative Law: Cases and Comments (1960 ed.), 441, 447-448.

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An answer to the first point may be that, as shown in 73 Harv. L. Rev. 84, 219-220 (1959), the possibility of the plaintiff's precipitating an unfair practice charge was present in *Leedom* v. *Kyne* itself; yet the Court evidently did not deem this fatal. An answer to the second, in the circumstances here, is that, with Marineros not on the ballot, the situation was not one, such as in *Local 1545*, where a victory by a particular union at the polls might eliminate any need for resorting to the courts; here, whether the winner was N M U, Sindimar, or "no-union," plaintiff

[7] The Supreme Court has already granted certiorari. —— U.S. —— (1961), in a case involving one rather typical pattern, *Incres Steamship Co., Ltd. International Maritime Workers Union*, 40 N.Y. 2d 218, 219 N.Y.S. 2d 21 (1961).

would suffer by being obliged to breach its contract with Marinéros and, on the allegations of its complaint, to violate Honduran law by doing so. Sufficient though these answers may be, a more generally satisfying one is again the distinction between a case with international aspects and one without. If action ordered by the Board would trench on the jurisdiction of a foreign government contrary to the will of Congress, the best time to stop it is before the offense occurs, not somewhere along the line.

(3) The final problem as to the power of the District Court to entertain the action arises from the contention of the Regional Director[8] that the action must be dismissed since the members of the Labor Board were indispensable parties-defendant but were not named as such and could not have been served with process in the Southern District of New York and would have had a valid venue objection, 28 U.S.C. § 1391(b), if they had been.

So far as we have been able to determine, this precise question has not been squarely decided by any court
88 of appeals. It has provoked differences of opinion in the district courts. In *American Communications Ass'n* v. *Schauffler*, 80 F. Supp. 400 (E.D. Pa. 1948), a three-judge court with one judge dissenting, and in *White* v. *Douds*, 80 F. Supp. 402 (S.D.N.Y. 1948), Chief Judge Ryan, held that the Board members were essential parties-defendant. In *Local 1545, United Brotherhood of Carpenters* v. *Vincent*, 187 F. Supp. 921 (S.D.N.Y. 1960), Judge Dimock took a contrary view, citing *Williams* v. *Fanning*, 332 U.S. 490 (1947); in affirming his dismissal of the complaint on other grounds, we expressly did not pass upon that issue, 286 F. 2d at 129. *Deering Milliken, Inc.* v. *Johnston*, —— F. 2d —— (4 Cir. 1961), lends support to Judge Dimock's position, although it involved the conduct of a hearing rather than of an election directed by the Board.

Williams v. *Fanning*, *supra*, upheld a suit to enjoin a postmaster from carrying out a fraud order of the Postmaster General. The rule there stated, 332 U.S. at 493-494,

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[8] The Board's order of November 15 provided: "The Regional Director • • • shall direct and supervise the election"; the supplemental order of December 5 provided "for the conduct of the election at the discretion of the Regional Director."

is that "the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him" but not "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court"; it is immaterial, in the latter event, that the subordinate "would be left under a command of his superior to do what the court has forbidden." This would seem to carry the day for plaintiff save for defendant's contention that the Board is not required to have an election conducted by the regional director, citing § 102.69 of its Rules and Regulations—the implication being, we suppose, that a decree against the regional director would not "effectively" grant relief since the Board could circumvent the decree by ordering someone else to conduct the election. We need not consider whether a response
89 that the Board could not do any such thing, since the decree would be *res adjudicata*, would be circular reasoning or not, see 3 Davis, Administrative Law Treatise (1958), pp. 602-603. For the Supreme Court, when confronted with an essentially similar contention with respect to the need for joining the Commissioner of Immigration and the Attorney General with the District Director in the review of a deportation order, deemed it enough to say, "But we need not decide the effect of such a judgment. We cannot assume that a decision on the merits in a court of appeals on a question of this kind, subject to review by this Court, would be lightly disregarded by the immigration authorities." *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 53 (1955). Significant also, and quite applicable here, is the Court's statement in that case, "Undoubtedly the Government's defense can be adequately presented by the District Director who is under the supervision of the Commissioner."[9] We hold the members were not necessary parties.

[9] See Notes, Williams v. Fanning Revisited: The Indispensable Superior in Judicial Review of Administrative Actions, 54 Colum. L. Rev. 1128 (1954); The Doctrine of Indispensable Parties as Applied in Review of Administrative Action, 103 U. of Pa. L. Rev. 238 (1954).

II. *The power of the Board to direct an election.*

Although the appeal is from denial of a temporary injunction, there appears to be no real dispute on factual matters. The case came before the District Judge on plaintiff's application for an injunction and the Board's motion to dismiss the complaint; hence we shall assume for the purposes of this opinion that the facts are as stated above, although the parties will be free to challenge them at a trial on final relief. The issue being one of law, the standard is whether we think the District Judge was wrong, not whether he was "clearly" so, *Carroll* v. *Associated Musicians*, 295 F. 2d 484, 488-489 (2 Cir. 1961), and cases cited.

90 The defendant's position proceeds from the basis that § 9(c) of the Act authorizes direction of an election if the Board has determined that "a question of representation affecting commerce exists"; that "affecting commerce" is defined by § 2(7) to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce"; and that § 2(6) defines commerce to include "trade, traffic, commerce, transportation or communication • • • between any foreign country and any State, Territory, or the District of Columbia." Literally the words cover the case. Yet the Board would hardly insist that the words apply to everything within their literal reach; we have not heard it suggested that the Board considers its power to extend to the stevedores who load Empresa's ships in Honduras although they are engaged in "commerce" quite as much as the seamen who man them. Neither do we suppose the Board would think it could direct an election among miners employed by a wholly owned subsidiary of an American company abroad, even though the ore was shipped to the United States and American employees of the parent were objecting to what they regarded as unfair wage competition arising from lack of effective organization among the foreign miners, although again the words literally apply. Words are not thus stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage, *Lauritzen* v. *Larsen*, 345 U.S. 571, 577-579, 581-582 (1953); as was said

in regard to another type of labor regulation, "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose," *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 286 (1949).

91 The problem of workers directly engaged in transportation is more difficult; the stevedores stay on the piers, the miners remain in the mines, but the seamen come to the United States and return. The Board is right in saying the scope of its power in respect of the latter is not to be determined by the simple notion that a Honduran registered ship is a floating piece of Honduran territory; that is a mere "figure of speech" whose fictitious character was exposed long ago, *Wildenhus' Case*, 120 U.S. 1 (1887); *Cunard SS. Co.* v. *Mellon*, 262 U.S. 100, 123-124 (1923).

Although Article 10 of the Treaty, which requires the United States to recognize Empresa's vessels as vessels of Honduras, also is not the end of our investigation, it surely must be the beginning. As was said with respect to the Jones Act in *Lauritzen* v. *Larsen*, 345 U.S. at 584-585, "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag" and, more generally, "the weight given to the ensign overbears most other connecting events in determining applicable law." How "cardinal" the importance is and how much "weight" should be given must depend, in the absence of clear expression by Congress, on what other factors of foreign and United States interest are present, and on the nature of the United States statute sought to be applied, taking particular account of the danger that an attempt to apply our law may result in a collision with the foreign sovereign. In the *Lauritzen* case the single United States factor, that Larsen had joined the crew and signed the articles in New York, was adjudged insufficient to tilt the scale against the law of the flag. So also, in *Romero* v. *International Terminal Co.*, 358 U.S. 354, 383-384 (1959), the factor that the injury occurred in New Jersey. On the other hand, in *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927 (2 Cir.), cert. denied, 287 U.S. 642 (1932), this court applied the Jones Act to

92 the American demise-charterer of a Honduran registered vessel, as to an accident on the high seas to an

American seaman hired in New York. See also the cases summarized in footnote 3 of the *Lauritzen* opinion, 345 U.S. at 573, and *Bartholomew* v. *Universe Tankships*, 263 F. 2d 437 (2 Cir.), cert. denied, 359 U.S. 1000 (1959).

Decisions in regard to the application of United States statutes dealing with seamen's wages are perhaps more directly relevant to our problem. A provision of the Seamen's Act of 1915, making it unlawful to pay wages in advance, 38 Stat. 1164, 1169, 46 U.S.C. § 599(e), was held inapplicable "when the contract and payment were made in a foreign country where the law sanctioned such contract and payment," even though the statute specifically extended to "foreign vessels while in waters of the United States," *Sandberg* v. *McDonald*, 248 U.S. 185, 194, 195 (1918), see also *Jackson* v. *SS. Archimedes*, 275 U.S. 463 (1928). On the other hand, the 1920 amendment of § 4 of the Seamen's Act, 41 Stat. 1006, 46 U.S.C. § 597, granting seamen on United States vessels the right to demand half of their earned wages at every port and making the section applicable to "seamen on foreign vessels while in harbors of the United States," was construed to cover the suit of a British seaman on a British vessel under British articles in the light of a further provision that "the courts of the United States shall be open to such seamen for its enforcement," *Strathearn SS. Co.* v. *Dillon*, 252 U.S. 348 (1902).[10]

93 It is with this background that we come to *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957). It involved the SS. Riviera, owned by a Panamanian corporation, sailing under the Liberian flag, and manned by a foreign crew, principally German and British, who had signed a British form of articles at Bremen, Germany. While the Riviera was in Portland, Oregon, loading

[10] The Court thought "the provisions of the act as the same are written" made plain "the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned • • •" 252 U.S. at 355. An abundance of legislative material leading to the same conclusion is summarized in the opinion that Mr. Justice Brandeis had prepared for possible delivery, see Bickel, The Unpublished Opinions of Mr. Justice Brandeis, pp. 35, 47 ff., reprinted in 69 Harv. L. Rev. 1177, 1190 ff. (1956), and *Monteiro* v. *Sociedad Maritima San Nicolas, S.A.*, 280 F. 2d 568, 573-574 (2 Cir.), cert. denied, 364 U.S. 915 (1960).

a cargo of wheat destined for India, crew members struck because of a wage dispute, and picketed the vessel. The picketing was later continued by three American unions. The ship-owner's action, in which federal jurisdiction was predicated on diverse citizenship, sought damages from these unions and their representatives, under Oregon law. The defense was that the Labor-Management Relations Act had preempted the field; the Supreme Court held the defense unfounded. The opinion, by Mr. Justice Clark, stated, 353 U.S. at 143:

> "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees."

Mr. Justice Douglas dissented on the ground that "The case involves a contest between American unions and a foreign ship"; that since the foreign ship was in competition with American vessels paying higher wages, "American unions * * * have a vital interest in the working conditions and wages of the seamen aboard this foreign vessel"; that the picketing, on American soil, either was or was not a violation of § 303(a)(1) or (2) of the Taft-Hartley Act; that "even if we assume *arguendo* that the foreign vessel would not be subject to the regulatory provisions of the Act, it could nonetheless sue under § 303(b) to get
94 protection from any unfair labor practice condemned by the Act"; hence Congress has occupied the field, 353 U.S. at 147-150. The only subsequent Supreme Court decision in this area is *Marine Cooks* v. *Panama SS. Co.*, 362 U.S. 365 (1960). The holding, that the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 104, deprived a district court of jurisdiction to enjoin an American union from picketing, on American soil, a Liberian ship owned by one Liberian corporation and time-chartered to another and manned by a foreign crew, is without direct application to the problem here. No conflict with foreign governments or foreign laws is caused if Congress chooses to stay a Federal court from enjoining the picketing in the United States of a foreign flag ship involved in a labor dispute, as it did in the case of

ships under our own flag until 1947 and still does so far as private suits are concerned, see *A. H. Bull S.S. Co.* v. *Seafarers' Int'l Union*, 250 F. 2d 326 (2 Cir. 1957). Hence the Court's conclusion that Congress intended the Norris-LaGuardia Act to apply in such a case does not support an inference that Congress intended the same with respect to the National Labor Relations Act—just as it does not show the contrary. However, in disapproving the Court of Appeals' reliance on *Benz* in reaching a contrary result, the Supreme Court said, at p. 369:

> "The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the Labor Management Relations Act had no such scope or coverage and that it accordingly did not pre-empt the labor relations field so as to bar an action for damages for unlawful picketing under Oregon Law."

95 The Board seeks to distinguish *Benz* on the ground that it involved no such indirect American ownership and no such regular coming and going from American ports as here. The "labor disputes between nationals of other countries operating ships under foreign laws," there said not to be covered by the Act, would thus not include a dispute where the employer was a wholly-owned subsidiary of an American corporation, also operating ships under our own flag, even when as here the subsidiary had been formed long before controversy arose and none of the ordinary bases for piercing the corporate veil exist, see *In re Gibraltor Amusements, Ltd.*, 291 F. 2d 22 (2 Cir.), cert. denied, —— U.S. —— (1961). Stress is laid upon the sentence in the *Benz* opinion, "The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing," 353 U.S. at 142, and upon the reference to "temporarily" in *Marine Cooks*. As against these respects in which the instant case is stronger than *Benz* for the application of the Labor Act, there is at least one in which it may be weaker. As Mr. Justice Douglas

pointed out in his dissent, the *Benz* case did not directly involve the application of the panoply of labor regulation embodied in §§ 7, 8, 9 and 10, but only the provisions of § 303 of the Taft-Hartley Act relating to picketing, there wholly on American soil; it is hard to believe that foreign governments would [illegible], or under international practice would have any right to be, concerned with whether the rights of their ships to damages for such picketing were governed by Federal or state law.[11] Here, on the other
96 hand, application of §§ 7, 8, 9 and 10 of the National Labor Relations Act would involve the risk of continuous conflict between the United States and Honduras with respect to labor conditions which, though of more interest to the United States than those in *Benz*, are still Honduras' "primary concern," 336 U.S. at 286.

The case made by plaintiff's complaint goes far beyond the flying of the Honduran flag, important as *Lauritzen* teaches that to be. In this case there are also the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels' regular visits to Honduras, the Honduran corporate identity -admittedly not fictitious- of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters. Though the vessels are engaged in the foreign commerce of the United States, they are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages: these are substantially outweighed for the purpose here at issue, by Honduras' interests.

Although the application of the Jones Act to accidents on foreign registered vessels involves the probability of rules of liability and amounts of recovery different from the law of the flag, as the discussions in *Lauritzen*, 345 U.S. at 575-576 and in *Romero*, 358 U.S. at 358, show,

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[11] However, the Court may have thought that the liabilities imposed on unions by § 303 and the rights conferred by §§ 7, 8, 9 and 10 must be regarded as a single package; see Note, The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet, 69 Yale L. J. 498, 518-519 (1960).

imposition of United States law on the rights of a seaman to recover against a ship owner or operator for personal injury is not likely to involve either party in a breach of contract with a third person or in the violation of a foreign governmental requirement. The occasional application of the antitrust laws to activities abroad has not been without its problems, see *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.*, [1952] 2 All E. R. 780, 782, 784; *United States* v. *Holophane Co.*, 352 U.S. 903 (1956), even though the activity is usually of relatively small significance to the total economy of the foreign land. Here, on the allegations of the complaint, the conflict between United States and Honduran law would be constant;[12] far from dealing only with incidents while the ships were in American waters, the Board would be regularly applying the shifting standards of its own decisions, and those of American courts and American legislators, to conduct in Honduras, where the bargaining between Empresa and its employees has always taken place;[13] it would be endeavoring to enforce its will on matters that Honduras, with a better claim, regards as for itself to decide. Compare *Vanity Fair Mills* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633, 646-647 (2 Cir.), cert. denied, 352 U.S. 871 (1956). The situation here differs sharply from the United States' informing itself as to contracts relating to the movement of traffic between the United States and a foreign country, *Kerr SS. Co.* v. *United States*, 284 F. 2d 61 (2 Cir. 1960); *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F. 2d 147, 153 (D. C. Cir. 1961), or even taking action with respect thereto, *Thomsen* v. *Cayser*, 243 U.S. 66 (1917). The case is appropriate for application of Mr. Justice Jackson's warning that "in dealing with international commerce we cannot be unmind-

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[12] See the discussion in 69 Yale L. J. 498, 514-515 (1960).

[13] A wryly amusing illustration is furnished by the Board's explanation, in its opinion in this very case, fn. 23, that the existing collective bargaining agreement between Empresa and Marineros "is not a bar to this proceeding, assuming it would otherwise be so effective, because the decision herein is issuing after the expiration date of that contract. See: St. Louis Independent Packing Company, 122 NLRB 887, 889." One wonders how fully the Labor Court of Honduras is informed about the NLRB's "contract-bar" rule.

ful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our
98 laws to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction." 345 U.S. at 582. We realize that if the Labor Act is inapplicable, owners of foreign flag ships such as Empresa will be deprived of the protection against certain unfair labor practices by the Federal courts accorded employers subject to the Act my such provisions as § 10(1) and § 303; but the practical consequences of this are less serious than those of a contrary holding. At least so the owners think, with the apparent concurrence of the Supreme Court in *Benz*.

Our belief that the Labor Act should not be held applicable in a case such as this is reinforced by the Geneva Convention on the High Seas, ratified by the United States on March 24, 1961, but not yet effective for lack of required ratification by 22 nations. Article 5, § 1, of the Convention reads:

> "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

Discussion seems to have been centered on what happens if the "genuine link" does not exist;[14] neither the
99 text nor such explanatory materials as we have found say specifically what happens if the conditions of the

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[14] The "genuine link" requirement as adopted was less stringent than proposals made by such governments as the United Kingdom and the Netherlands and by the International Labor Conference, "which would have enabled states other than the flag state to withhold recognition of the national character of a ship if they considered that there was no 'genuine link' between the state and the ship." Report of the Committee on Foreign Relations to

final sentence are met. Yet, since it was deemed so important to insist upon the existence of a "genuine link" and the flag state's effective exercise of "jurisdiction and control in administrative, technical and social matters over ships flying its flag," it would be unreasonable to conclude that when all this had been done other states do not owe some obligation of respect.[15]

Three other matters ought be mentioned before we conclude:

(1) We have not discussed the conflicting contentions as to the effect of Article 22 of the Treaty with Honduras, quoted in footnote 4—plaintiff arguing that application of the Labor Act would violate the first clause, particularly in the light of the Supreme Court's statement in *Marine Cooks* quoted above, and defendant contending that the matter is one of "the execution of contracts" as to which the final sentence permits the application of "local laws." The problem is not an easy one; the view we take of the instant case makes it unnecessary for us to decide it.

(2) We realize that American unions understandably desire to organize vessels which they conceive to be in substance a part of this country's merchant marine, and that attempts to implement that desire can lead to a breach of the industrial peace which the Board is bound to promote, particularly when, as here, the stockholder of the foreign flag ships operates American flag vessels as well. Last summer's strike of the American merchant marine, with which we have some familiarity, see *United States* v.

the Senate, 106 Cong. Rec. 10382 (1960). The Senate was told that the effect of the language as adopted in Geneva is that "no state can claim the right to determine unilaterally that no genuine link exists between a ship and the flag state," but "Nevertheless, there is a possibility that a state, with respect to a particular ship, may assert before an agreed tribunal, such as the International Court of Justice, that no genuine link exists. In such event, it would be for the Court to decide whether or not a genuine link existed." *Id.*

[15] Although the Geneva Convention has not yet become effective, a convention representing such a consensus of thought by the leading maritime nations should be given weight by a United States court as evidence of international practice, especially after ratification by this country.

National Marine Engineers' Beneficial Assn., 294 F. 2d 385 (2 Cir. 1961), sufficiently demonstrates this. Therefore, we recognize that a controversy between an American union and Empresa could lead or tend to lead "to a labor dispute burdening or obstructing commerce or the free flow of commerce" carried on by American flag ships, as well as directly obstructing commerce carried on by foreign ones. However, that scarcely is decisive—the question still is how far Congress intended to permit the Board to intervene in what would normally be the affairs of a foreign government in order to prevent this. Even if we were to make the unrealistic assumption that Congress was so far-seeing as not only to have contemplated the growth of flags of convenience when it adopted the Labor Act in 1935,[16] but also to have anticipated cases where an American company would operate some ships under our own flag and
101 others through foreign subsidiaries flying the flags of other countries, we see no basis for believing Congress would have chosen to solve the problem by an exercise of jurisdiction which would create such a conflict with a foreign government as would seem inevitable here. Mr. Justice Clark's statement in *Benz*, 353 U.S. at 147, seems exceedingly apposite:

> "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the faculities necessary to make fairly such

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[16] The use of "flags of convenience" by United States' enterprises is said to have begun in an effort to make what had been American ships available for the transportation of needed cargoes to powers resisting Nazi aggression despite the Neutrality Act of 1939, 54 Stat. 4, 6 Benedict, Admiralty (1958), 219-220; Note, Pan-Lib-Hon Registration of American-Owned Merchant Ships: Governmental Policy and the Problems of the Courts, 60 Colum. L. Rev. 711, fn. 1 (1960). It has continued for economic reasons. See Note, The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet, 69 Yale L. J. 498 (1960). The letter of the Secretary of Defense attached to the Attorney General's brief to the NLRB indicated that, as of 27 September 1960, the deadweight tanker tonnage available to the United States under "Panlibhon" (Panama, Liberia, Honduras) registry was some 120%, and the general cargo tonnage some 46%, of the United States flag tonnage.

an important policy decision where the possibilities of international discord are so evident and retaliative action so certain."[17]

(3) In order to avoid any possible misunderstanding in this controversial area, we emphasize that we are deciding only the case before us; what the result should be when the contacts of the country of the flag are weaker relative to those of the United States than here, we do not say.[18]

The order denying a temporary injunction is reversed.

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[17] The Secretary of Labor has announced the creation of a three-man review board to study the flag of convenience controversy. N. Y. Times, Sept. 20, 1961, p. 47, col. 6.

[18] The Board decisions include *West India Fruit and Steamship Co., Inc.*, 130 NLRB No. 46, an unfair labor practice case now pending, on petition to review, in the Fifth Circuit; *Peninsular & Occidental SS. Co.*, 132 NLRB No. 1, also an unfair labor practice case; *Eastern Shipping Corp.*, 132 NLRB No. 72, and *Hamilton Bros., Inc.*, 133 NLRB No. 85, both representation cases. *Navios Corp.* v. *National Maritime Union*, 402 Pa. 325, 166 A. 2d 625 (1960), cert. denied, 366 U.S. 905 (1961), and *Incres Steamship Co., Ltd.* v. *International Maritime Workers Union*, 10 N.Y. 2d 218, 219 N.Y.S. 2d 21, cert. granted, —— U.S. —— (1961), involved the applicability of state laws with respect to picketing, as against claims of federal preemption.

102 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, *Chief Judge*, Hon. Henry J. Friendly, Hon. Thurgood Marshall, *Circuit Judges*.

Empresa Hondureña de Vapores, S. A., *Plaintiff-Appellant*,

v.

Ivan C. McLeod, Regional Director for The Second Region of the National Labor Relations Board, *Defendant-Appellee*,

National Maritime Union of America, AFL-CIO, *Intervenor-Appellee*.

Judgment—January 12, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

A. Daniel Fusaro
Clerk

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103 (File endorsement omitted)

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104 (Clerk's Certificate to foregoing transcript omitted in printing)

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105 UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK

I, A. Daniel Fusaro, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from A-B, 1A to 84A,

inclusive, comprise the original record certified by the Clerk of the United States District Court for the Southern District of New York in the case of,

EMPRESA HONDURENA DE VAPORES, S. A., *Plaintiff-Appellant*,

against

IVAN C. MCLEOD, Regional Director for the Second Region of the National Labor Relations Board, *Defendant-Appellee*,

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, *Intervenor-Appellee*.

filed in my office on December 19, 1961 and removed from the files of this Court in pursuance of an order of this Court dated January 29, 1962.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this first day of February in the year of our Lord one thousand nine hundred and sixty-two, and of the Independence of the said United States the one hundred and eighty-sixth.

A. DANIEL FUSARO
Clerk

[SEAL]

106 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DEPARTMENT OF JUSTICE

Washington

January 10, 1962

Honorable Alexander Holtzoff
United States District Judge
United States Courthouse
Washington 1, D. C.

Re: Sociedad National de Marineros
de Honduras v. McCulloch, et al.
Civil Action No. 4020-61

Dear Judge Holtzoff:

As a result of your inquiry I have sought to ascertain the views of the Department of State with respect to the Honduran Note of November 29, 1961 attached to the complaint in the above-entitled action. The Department of State informs me that, although the Department does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case.

We are sending copies of this letter to the counsel of record.

Sincerely yours,

WILLIAM H. ORRICK, JR.
William H. Orrick, Jr.
Assistant Attorney General

Let this be filed. Holtzoff, J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

61 Civil 4413

EMPRESA HONDURENA DE VAPORES, S. A., *Plaintiff*,

against

IVAN C. MCLEOD, Regional Director for the Second Region of the National Labor Relations Board, *Defendant*.

Order—February 15, 1962

A motion having been made by plaintiff for an order providing that the mandate of the United States Court of Appeals for the Second Circuit, consisting of the opinion of the Honorable Henry J. Friendly, Circuit Judge, concurred in by the Honorable J. Edward Lumbard, Chief Judge and Thurgood Marshall, Circuit Judge, and the order of reversal of the United States Court of Appeals for the Second Circuit dated January 12, 1962, filed with the Clerk of this court on January 30, 1962, be made the order of this court and providing for the injunctive relief requested by plaintiff in the order to show cause dated December 12, 1961, and providing for the denial of the motion made by defendant for a dismissal of the action, and on motion of White & Case, attorneys for plaintiff, it is

1. Ordered, that the mandate of the United States Court of Appeals for the Second Circuit, filed with the Clerk of the United States District Court for the Southern District of New York on January 30, 1962, is hereby made the order of this court;

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109 2. Ordered, that pending the trial and adjudication of the issues raised by the complaint herein, the defendant, Ivan C. McLeod, Regional Director for the Second Region of the National Labor Relations Board, and all persons acting for or in concert or in participation with him who receive actual notice of this order by personal service or otherwise, are hereby enjoined from conducting a representation election among plaintiff's unlicensed seamen until the final hearing and determination of this action, and it is further

3. Ordered, that security in the amount of $500 be furnished by plaintiff conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, and it is further

4. Ordered, that the motion of defendant to dis-
110 miss the complaint be, and the same hereby is, denied.

Dated: New York, New York
February 15th, 1962

Edmund L. Palmieri
United States District Judge

A True Copy

Herbert A. Charison, *Clerk*
By Elsie M. Eiler, *Deputy Clerk*

111 SUPREME COURT OF THE UNITED STATES

No. 858, October Term, 1961

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board, *Petitioner*,

vs.

EMPRESA HONDURENA DE VAPORES, S. A.

Order Allowing Certiorari—June 11, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.

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112 SUPREME COURT OF THE UNITED STATES

No. 862, October Term, 1961

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, *Petitioner*,

vs.

EMPRESA HONDURENA DE VAPORES, S. A.

Order Allowing Certiorari—June 11, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 107

FRANK W. McCULLOCH, CHAIRMAN, and PHILIP RAY RODGERS, ET AL., MEMBERS, NATIONAL LABOR RELATIONS BOARD, PETITIONERS

vs.

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MAY 7, 1962
CERTIORARI GRANTED JUNE 11, 1962

Supreme Court of the United States

OCTOBER TERM, 1962

No. 107

FRANK W. McCULLOCH, CHAIRMAN, and PHILIP RAY RODGERS, ET AL., MEMBERS, NATIONAL LABOR RELATIONS BOARD, PETITIONERS

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[fol. 1] [File endorsement omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4020-'61

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, PUERTO CORTES, DEPARTMENT OF CORTES, HONDURAS, PLAINTIFF

v.

FRANK W. MCCULLOCH, CHAIRMAN, and PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, and GERALD A. BROWN, MEMBERS, NATIONAL LABOR RELATIONS BOARD, WASHINGTON 25, D. C., DEFENDANTS

COMPLAINT—(To set aside Decision and Direction of Election of the National Labor Relations Board; for Temporary Restraining Order and Preliminary and Permanent Injunctions)—Filed Dec. 16, 1961

The plaintiff, Sociedad Nacional de Marineros de Honduras, for its cause of action represents to the Court as follows:

1. *Jurisdiction and Parties*

1. This action arises under the Constitution of the United States, under the National Labor Relations Act, particularly Section 9 of the Act (49 Stat. 453, 29 U.S.C. § 159), and under the Administrative Procedure Act, particularly Section 10 of the Act (60 Stat. 243, 5 U.S.C. § 1009). The matter in controversy exceeds the value of $10,000.00, exclusive of interest and costs.

2. Defendants are members of the National Labor Relations Board (Board), an agency of the United States, having been duly appointed under and by virtue of the provisions of Section 3(a) of the National Labor Rela-

tions Act (49 Stat. 451, 29 U.S.C. § 153) and having their principal office in the District of Columbia.

[fol. 2] 3. Plaintiff, Sociedad Nacional de Marineros de Honduras (Sociedad), is a labor union organized and existing under the laws of the Republic of Honduras with its head offices in Puerto Cortes, Department of Cortes, Honduras, and is an entity authorized to bring this suit in the association name.

4. Empresa Hondurena de Vapores, S.A. (Empresa), is a corporation duly organized in 1941 under the laws of the Republic of Honduras, with its principal office and place of business at Puerto Cortes, Honduras. Empresa is in the business of owning and/or operating a fleet of seagoing vessels which are registered under the laws of Honduras and fly the Honduran flag. Its vessels are manned by unlicensed seamen, all of whom are members of Sociedad, employed in Honduras under shipping articles executed in Honduras. All of the seamen supplied to Empresa by Sociedad are citizens of Honduras except one who is a Jamaican citizen and a subject of Great Britain.

Empresa is a wholly-owned subsidiary of United Fruit Company, a New Jersey corporation. Plaintiff is informed that none of Empresa's officers or directors is employed by, or associated with, United Fruit Company and that since its formation in 1941, all of Empresa's officers and directors have resided in Honduras.

5. Sociedad is recognized by the Republic of Honduras as the sole collective bargaining agent of Empresa's seamen employees. Collective bargaining agreements have been in effect between Empresa and Sociedad since 1942. The agreement now in effect is dated March 29, 1957. With certain adjustments as to wages and related matters, this contract has been in effect at all times since said date and has been renewed by its terms until April 15, 1963. (A copy and translation are attached as Exhibit 1.) [fol. 3] At no time has Sociedad acted as bargaining representative of employees of United Fruit Company, and United Fruit Company has never participated in collective bargaining with Sociedad.

6. Because Sociedad is the sole bargaining agent of Empresa's seamen employees, Sociedad and its members

are forbidden under Art. 499, para. (f), of the Honduran Labor Code to take part in any activity which would have the effect of denying the exclusive jurisdiction of the Honduran labor authorities to regulate labor relations. In this connection, Sociedad is advised that Empresa has received from the Government of Honduras an official ruling of its Ministry of Labor to the effect that the action of the National Labor Relations Board in this case, in assuming jurisdiction over Empresa and its unlicensed seamen and in directing the election hereafter referred to, is a violation of the sovereignty of the Republic of Honduras and is null and void under its law. (A translation of the said ruling is attached as Exhibit 2.)

7. On November 15, 1961, the Board rendered its Decision and Direction of Election, Case No. 2-RC-10378, re *United Fruit Company and National Maritime Union of America, AFL-CIO* (a copy of which Decision and Direction of Election is attached as Exhibit 3). In the proceeding, National Maritime Union of America, AFL-CIO (NMU), petitioned for a representation election aimed at entitling it to represent the unlicensed seamen employed by Empresa. The Board held that because of certain ties which it thought existed between the foreign company, Empresa, and the domestic company, United Fruit Company, that Empresa came under the jurisdiction of the Board. The Board directed the holding of an election among the employees of Empresa to determine their representation for collective bargaining [fol. 4] purposes either by NMU or by the Union known as Sindicato Maritimo Nacional (sic) de Honduras, "Sindimar", or by neither. Plaintiff Sociedad was not a party to the proceeding, did not participate in any way, and was not included in the Board's order as a union for which Empresa employees might vote as their representative. Plaintiff has not been advised by the Board with respect to the carrying out of the Board's order of election, but has been informed by Empresa that the election is scheduled to take place commencing Sunday, December 17, 1961, by balloting on board vessels owned or operated by Empresa upon their arrival in ports of the United States between December 17, 1961, and

January 31, 1962, and by mailing ballots to said employees aboard vessels not scheduled to call at United States ports between said dates.

8. However, under the laws of Honduras, the petitioner in Board Case No. 2-RC-10739, NMU, cannot gain recognition by the Honduran Government and could not lawfully represent the unlicensed seamen of plaintiff not only because Sociedad is the exclusive bargaining agent, but also because of Articles 490 and 504 of the Honduran Labor Code, which provide (in translation) as follows:

> "Article 490: No union may be permitted to act as such nor to exercise the functions prescribed to it by law or by its respective by-laws, nor to exercise its rights so long as it does not have recognition of its juridic personality, and may act as such only during the time it is so recognized."
>
> "Article 504: No union may function whose personnel is not composed of at least ninety percent (90%) of Honduran citizens. No matter what is the form of direction of the union, no alien is eligible for directive posts."

NMU does not have Honduran recognition of its juridic personality, nor are at least 90% of its personnel Honduran citizens.

Furthermore, if "Sindimar" should prevail in the election ordered by the Board, there will have been created an irreconcilable conflict under Honduran law because of Sociedad's exclusive bargaining position.

[fol. 5] 9. The Board had no jurisdiction to direct an election among the members of the plaintiff organization, and in so directing acted in excess of its powers. The Supreme Court of the United States held in *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), that the Labor Management Relations Act of 1947 (Chapter 7, Title 29 of the United States Code) does not apply to labor relations between nationals of foreign countries operating vessels under foreign laws and their foreign workers. In *Leedom* v. *Kyne*, 358 U.S. 184 (1958), the Supreme Court held that a District Court had the jurisdiction and the power to vacate an order of the Board

because it had been made in excess of the Board's powers. These decisions clearly establish the jurisdiction and duty of the Court to grant the relief requested in this case.

10. In addition, by taking jurisdiction and acting in this case the Board violated the Constitution of the United States in the following respects:

a. *Article VI* of the Constitution is violated because the action of the Board contravenes the provisions of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras dated December 7, 1927, 45 Stat. 2618 (1927). Article 10 of this treaty states:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown."

The Government of Honduras has protested the Board's action in the instant proceeding in a note to the Secretary [fol. 6] of State of the United States dated November 29, 1961 (a copy of which is attached as Exhibit 4). Honduras claims the action of the Board constitutes a direct violation of its treaty rights with the United States.

The Government of the United States in a brief amicus filed with the Board earlier in Case No. 2-RC-10379 pointed out that a direct treaty violation would be involved if there was a failure on the part of the United States to treat merchant vessels flying the flag of Honduras as vessels of that nation.

b. *Article II, Section 2* of the Constitution is violated because the Board action is in disregard of the principles of international law recognized and adhered to by the Department of State and infringes upon the functions and powers granted to the Executive Department of the United States Government to conduct the foreign affairs of the United States.

c. *Article I, Section 8* of the Constitution would be violated if the Board's action were to be held within its

jurisdiction under the National Labor Relations Act because in granting such authority to the Board, Congress would have exceeded the powers entrusted to it under the Constitution.

d. *Amendment* V of the Constitution which protects plaintiff against deprivation of its "liberty, or property, without due process of law", has been violated in that the order of the Board impairs the collective bargaining contract in effect between plaintiff and the employer, Empresa.

11. Plaintiff and its members will suffer immediate and irreparable damage unless the defendant Board, its agents, servants, employees, attorneys and all persons acting for and in concert with it are enjoined from conducting an election among the seamen employees of [fol. 7] Empresa, in the following respects, among others.

a. Plaintiff will be denied the protection and rights granted to it under the laws and Constitution of the United States;

b. Plaintiff will be caused to violate its existing collective bargaining agreement with Empresa and may be subjected to damages and other sanctions as a consequence thereof;

c. Plaintiff's members will be caused to violate Honduran law by participating in the election pursuant to the Board's order in the instant proceedings and may thereby be subjected to penalties and other sanctions under Honduran law;

d. The operation of Empresa's vessels will be impaired and plaintiff's relations with Empresa will be seriously disturbed and disrupted, all to plaintiff's loss and economic disadvantage.

12. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays that the Court issue an immediate temporary restraining order enjoining the holding of an election under the aforesaid Decision and Direction of Election of the Board until the matter may be heard on plaintiff's motion for preliminary injunction.

Plaintiff prays that the Court issue a preliminary injunction restraining the Board from conducting an elec-

tion, and that on final hearing, this preliminary injunction be made permanent, restraining the defendant Board, its agents, servants, employees, attorneys and all persons acting in concert with it from carrying out the Board's aforesaid Decision and Direction of Election dated November 15, 1961, and from conducting an election among plaintiff's members and prays that the Board's Decision and Direction of Election be vacated.

[fol. 8] Plaintiff prays that this Court grant such other and further relief as is just.

Respectfully submitted,

Charles S. Rhyne
Brice W. Rhyne
Herzel H. E. Plaine
Lenox G. Cooper
RHYNE & RHYNE
400 Hill Building
Washington 6, D. C.

By /s/ Herzel H. E. Plaine
HERZEL H. E. PLAINE
Attorneys for Plaintiff

December 16, 1961

[fol. 9] VERIFICATION

District of Columbia)
City of Washington) ss.:

Brice W. Rhyne, being duly sworn, says that he is one of the attorneys in fact for the plaintiff in this action, pursuant to a power of attorney executed in the Republic of Honduras on December 13, 1961; that the foregoing complaint is true of his own knowledge except as to the matters stated to be alleged upon information or belief, and that as to those matters he believes them to be true. The sources of deponent's information and the grounds for his belief are the record and exhibits in Case No. 2-RC-10739 (*United Fruit Company and National Maritime Union of America, AFL-CIO*) before the National Labor Relations Board, which proceeding resulted in the Decision and Direction of Election dated November 15, 1961, under which the defendant Board proposes to take action herein sought to be enjoined, and the papers filed in the United States District Court Southern District of New York in Empresa Hondurena de Vapores, S.A. against Ivan C. McLeod, Regional Director for the Second Region of the National Labor Relations Board, 61 Civ. 4413.

This verification is made by deponent and not by an officer of the plaintiff because all of plaintiff's officers reside in the Republic of Honduras and none is presently within the United States.

/s/ Brice W. Rhyne
BRICE W. RHYNE

Sworn to before me this
16th day of December, 1961

[SEAL] /s/ Edward D. Coxen
Notary Public, D. C.

[fol. 10] EXHIBIT 1 TO COMPLAINT

Empresa Hondurena De Vapores, S.A.
Authorized Translation of Collective Contract for
Maritime Work with Sociedad Nacional
De Marineros De Honduras
Effective April 16, 1957

EMPRESA HONDURENA DE VAPORES, S.A.
AUTHORIZED TRANSLATION
COLLECTIVE CONTRACT FOR MARITIME WORK:

The undersigned, FRANCISCO COSENZA AREVALO, of age, married, merchant and residing in the Sectional District of Puerto Cortes, Department of Cortes, as party of the first part, acting in name and representation of the maritime workers association called "SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS", organized and existing under the laws of the Republic of Honduras, with head offices in Puerto Cortes, Department of Cortes, and recognized as a juridic person by the Executive Power in Acuerdo No. 1582 issued through the Ministry of the Interior, Justice, Sanitation, and Public Welfare, under date of May 17, 1940; and Mr. Cosenza Arevalo acting as President of the Board of Directors of said Association and as its Representative, in accordance with the provisions of Article 27, Letter A) of its bylaws; and JOSEPH FELIX AYCOCK, of age, widower, Business Agent and with residence in the city of San Pedro Sula, D.D., Department of Cortes, as party of the second part, acting in name of and representation of the Corporation called "EMPRESA HONDURENA DE VAPORES, S.A." organized and existing under the laws of the Republic of Honduras, with head office in the port of Puerto Cortes, Department of Cortes, and recognized as a juridic person by the Executive Power in Acuerdo No. 1383 issued through the Ministry of the Interior, Justice, Sanitation and Public Welfare under date of March 28, 1941; and Mr. Aycock acting as President of the Board of Directors of said Corporation and as its legal representative, in accordance with the provisions of Article 26 of its bylaws; hereinafter the "Sociedad

Nacional de Marineros de Honduras" shall be called "the Association" and the "Empresa Hondurena de Vapores, S.A." shall be called "the Company"; and the parties Cosenza Arevalo and Aycock, in the name of their constituents, have agreed to enter into, as indeed by these presents they do enter into, the following collective contract for maritime work:

1. While this contract is in effect, the Company by these presents recognizes the Association as the sole representative of all seamen employed or to be employed on board the Honduran flag ships owned by, operated by, or for which the Company is agent, in all things pertaining to conditions of employment with the Company, or to the disputes, or controversies that may arise between said seamen and the Company regarding conditions of work on board the vessels or to the stipulation of this contract. Consequently all members of the Association that may be employed on the Company's ships shall be subject to and must comply with the stipulations of this contract.

2. This contract is applicable only to such seamen who are not required to put up a bond for the discharge of their duties or who do not hold on board a technical or professional position for the discharge of which a certificate of competence may be required, and therefore it shall not apply to the Captain and other Officers of the ship.

[fol. 11] 3. During the term of this contract the Company obligates itself to employ exclusively on board its ships, and the Association obligates itself to furnish seamen who are members of the association, after their status as such has been established, and who possess the required experience, knowledge and capacity for the performance of their duties on board; but if the Association does not have available or cannot furnish at any given moment the number of seamen of the specified qualifications requested by the Company, the latter may in that case employ seamen who are not members of the Association. It is also understood that this clause shall not hinder or restrict in any way the right which the Company has of reemploying and to continue employing and

freely using such seamen who may return to work after an absence due to illness, accident, leave of absence or vacation.

4. Any seaman about to be employed on board the Company's ships shall have to be in good health and pass previously and successfully the medical examination prescribed by the Company, who may refuse employment to any seaman who, in the judgment of the Company's doctors may not possess the conditions of health necessary for the performance of the duties to be assigned to him on board.

5. During the life of this agreement the Company obligates itself to keep and maintain all of its vessels in a safe and seaworthy condition and at all times to maintain the lifesaving equipment, machinery, gear, and other equipment in good operating condition.

6. Whenever a Company's ship should be in a foreign port stranded or under repairs, or being cleaned, or for other reasons, and it should become necessary for these reasons to take her crew ashore, the Company agrees to continue paying to the members of the crew so landed their salaries as provided in Article 12 of this contract: and during the period that such members of the crew who are living ashore, the Company shall furnish them room and board at whatever appropriate place the Company may select, until such time as the ships shall be in condition to take the crew aboard, or until such time as such seamen shall be repatriated or transferred to the crew of another ship, whichever of these occurs first; it being understood that the Company shall have the option of giving in cash to each seaman in United States Currency, or its equivalent in Lempiras or in the currency prevailing in the place of payment, the cost of his room and/or board, which shall be per day per person the following:

a)	For Room Allowance	$3.00
b)	" Breakfast	1.25
c)	" Lunch	1.25
d)	" Supper	1.25

7. Venereal Disease: Whenever a member of the crew should be left on shore before the termination of his

contract of engagement, for his medical treatment or hospitalization because he is impeded or unable to perform his duties on board the ship owing to some venereal or syphilitic disease, the Company shall have no obligation to support him or pay him any salary whatsoever while he remains on shore or during the duration of his illness, or while he remains unable to perform his duties, or during the time after his recovery that he may have to wait to be re-employed on board; it being understood that if the Company should incur expenses for the board, lodging, treatment, hospitalization or medical attention [fol. 12] of such seaman, such expenses shall be reimbursed by him to the Company in a proportion to be determined by the Company itself and through deductions that the Company shall make periodically from his salary.

Should the Company not re-employ such seaman, and he has been left on shore in a port other than the port of his engagement, it shall repatriate him as provided in Article 15 of this contract.

8. Every member of the association who is a member of the crew of any of the Company's ships shall at all times be under the orders of the Captain whose instructions and those of the officers of the ship he shall obey at all times. The Company may at any time dismiss any member of the crew whose services or conduct, in the judgment of the Company, may not be satisfactory, or if he should disobey the orders of the Captain and any other Officers of the ship, or for insubordination or disregard of the ship's discipline, without prejudice to other responsibilities to which he may be liable. In the event any seaman is so dismissed in a foreign port the Company shall repatriate him in the manner provided in Article 15 of this contract. Any member of the crew who considers that he has been unjustly dismissed may appeal the matter direct to the management of the Company. If the matter is not satisfactorily settled on this level, in such event, the matter shall be considered a dispute and must be handled and disposed of in the manner provided for in Article 11 of this contract.

9. MARITIME LABOR ACCIDENTS:

(a) It is agreed that any loss of life or any temporary or permanent incapacity that any seaman employed on board a Company ship may sustain, while this contract is in effect, as a direct result of a maritime labor accident, shall be compensated by the Company in accordance with the provisions of Title XI of the Organic Law of the National Merchant Marine of Honduras (Decree No. 55 of March 3, 1943.) It is further agreed that the accidents contemplated by this clause are those defined by Article 35 of said Law as maritime labor accidents.

(b) If a member of the crew, due to his temporary incapacity claimed by him to have been caused by an injury, wound or corporal infection classified as a maritime labor accident, stays or is left in port for his cure, medical attention or hospitalization, the Company shall pay him, pending investigation of such accident and while such seaman is on land receiving medical treatment, or waiting to be re-employed or repatriated, one-half of his monthly salary, (and also Four Lempiras (L. 4.00) per day for his maintenance and lodging during the time that he is not hospitalized). This payment shall end on the day that the incapacity is cured or declared to be a permanent one, or on the day that such seaman is re-employed or repatriated, whichever of these occurs first. If, as the result of the investigation, it is found that the incapacity in question was not caused by the alleged labor accident, and that the seaman is not entitled to the compensation provided in Article 44 of said Law, the seaman shall reimburse the Company the one-half monthly salary so paid him, such reimbursement to be made through periodic deductions that the Company shall make from the seaman's salary.

(c) If any member of the crew should lose his life as a result of such maritime labor accident, it is agreed that in the absence of a will left by such seaman designating a beneficiary of the death benefit provided in paragraph (d) of said Article 44 of Decree No. 55 of March 3, 1943, such death benefit shall be paid only to the legitimate or acknowledged natural relatives of the [fol. 13] seaman mentioned in numerals 1, 2, and 3 of

said paragraph (d) of Article 44 of said Decree No. 55. Therefore, no such payment shall be made to the unrecognized natural descendants, ascendants, brothers or collateral relatives of the seaman.

(d) The Company may at its own option contract with private insurance companies for the payment of the compensations specified in the preceding paragraphs (a), (b) and (c), and if this should be arranged, the Company shall be relieved from the obligation to pay said compensations, which shall then be paid directly by the insurance company engaged for the purpose.

10. The Company obligates itself to dismiss from its employ, upon termination of ship's voyage, any member of the crew, whom the Association may notify in writing that he is not an active member of the Association. The Association and the Company mutually agree that they will not discriminate against any man because of race, creed, or color.

11. It is agreed that during the term of this contract, there shall be no lockout ordered by the Company, nor declaration of strikes or suspension of work decreed by the Association or its members, on account of labor controversies or for any other causes. If any disputes or differences should arise between the contracting parties, it shall be resolved thus:

The matter in dispute shall be submitted to the decision of two arbitrator[s] of fact, one named by each party who shall be impowered to name a third in case of discord between said arbitrators. If any of the contracting parties should fail to name its arbitrator within ten days after being called upon to do so, or if the arbitrators named by the parties should not agree in naming a third, in that case the Commandant of the Honduran port of arrival of the ship shall make the appointment. The decision of the arbitrator of fact, or of the third in its case, shall be final and binding to the parties, and against it there shall be no appeal whatsoever, producing the effect of a firm sentence with the authority of "res judicata".

Any dispute arising during the voyage of a ship, shall be resolved in the manner prescribed in this article as soon as the vessel reaches a Honduran port, but if the vessel is not returning to Honduras within a term of 60 days, then the dispute shall be submitted abroad to the decision of the Official or person designated by the Government of Honduras for that purpose, and his decision shall have the same final effect as the decisions of the aforesaid arbitrators of fact.

12. WAGES: During the term of this contract, the Company shall pay to the rating listed below, when carried the following monthly wages in United States Currency, or its equivalent in Lempiras or in the currency prevailing in the place of payment:

I.	DECK DEPARTMENT	
	Carpenter	$160.00
	Boatswain	153.50
	Carpenter-Boatswain	160.00
	A. B. Seaman	140.00
	Ordinary Seaman	120.00
	*First Pumpman	166.00
	*Second Pumpman	153.50
	*Storekeeper	148.00
	*Painter	140.00

[fol. 14]

II.	ENGINE DEPARTMENT	
	Oiler	151.00
	Fireman for Oil Burning Vessels	140.00
	Wiper	125.00
	Utility Man	125.00
III.	STEWARD'S DEPARTMENT	
	Chief Steward and Cook	$210.00
	Chief Cook	210.00 A
	Chief Cook	196.00 B

* F. R. Hart only

A—On the steamships *MUSA, PLATANO, IRIONA, LA PLAYA, AZTEC, TOLTEC, MAYA, MABAY, MANAQUI, COPAN, CHOLOMA, CHOLUTECA, F. R. HART, ALMIRANTE, ARAGON, ATENAS.*

B—On the steamships *LEMPA, LEON, TELDE, OROTAVA.*

Second Cook	160.00	
Baker	160.00	
Second Cook and Baker	175.00	C
Second Cook and Baker	162.00	D
Second Cook and Baker	156.00	E
Utilityman	125.00	
Endman	120.00	
Saloonman	132.00	
Officers' Messman	125.00	
Messman	120.00	
Messboy	115.00	

C—On the steamships *IRIONA, AZTEC, TOLTEC, MAYA, MUSA, PLATANO, F. R. HART, ALMIRANTE, ARAGON, ATENAS.*

D—On the steamships *LA PLAYA, MABAY, MANAQUI, COPAN, CHOLOMA, CHOLUTECA.*

E—On the steamships *TELDE, OROTAVA, CUBAHAMA, LEMPA, LEON.*

These wages shall be paid from the day when the seaman signs the roll of the crew until the day his services cease on board. Any seaman who fails to sail with his ship at the specified time shall lose his rights to salary from that date.

13. VACATIONS: After one year of continuous service on the Company's vessels, the Company shall grant annually to each member of the crew enumerated in Clause 12 vacation with pay, thus:

(a) After the first year of continuous service, seven calendar days' vacation.

(b) After two years of continuous service the Company shall grant an annual vacation of fourteen calendar days.

(c) After five years of continuous service the Company shall grant an annual vacation of 21 calendar days.

(d) The continuity of services for the purposes of this article will not be considered interrupted by leaves of absence granted for sickness, accident or granted for other legitimate reasons nor for time lost due to lay-offs. Nevertheless said periods of absence from active service will not be counted in computing the year's service for the granting of vacations.

Said vacations may be accumulated up to a total not to exceed 28 calendar days, it being understood that the Company shall grant vacations at the time of the year most convenient to it, or when its maritime services permit.

[fol. 15] 14. ILLNESSES:

(a) NONOCCUPATIONAL AND NONCULPABLE ILLNESS: If any member of the crew should become ill on board the ship and he should be left on shore for his care, and if the illness is not occupational and does not proceed from a culpable act of the seaman himself, the Company shall pay him for its own account his medical, surgical, pharmaceutical and hospitalization expenses, (and also FOUR LEMPIRAS (L.4.00) per day for his maintenance and lodging during the time that he is not hospitalized), it being understood that the Company shall make these payments until the seaman is cured or until the illness is declared incurable or of a permanent character, or until the seaman is re-employed or repatriated, whichever of these occurs first, but in no case will the Company make these payments when the illness proceeds from the culpable act of the seaman himself.

(b) OCCUPATIONAL ILLNESS: If a member of the crew should be left on shore due to his having contracted on board in the service of the ship an occupational illness not caused by his own fault, the Company shall pay him for its own account, while he remains ashore undergoing medical and hospital treatment, one-half of his monthly salary and also his medical, surgical, pharmaceutical and hospitalization expenses, (and in addition FOUR LEMPIRAS (L.4.00) per day for his maintenance and lodging during the time that the seaman is not hospitalized) until the seaman is cured and has been declared fit for duty, or until his occupational illness is declared incurable or of a permanent character, or until the day that such seaman is re-employed or repatriated, whichever of these occurs first, these

payments to be continued in the event that such seaman is repatriated before he is cured or before his occupational illness is declared incurable or of a permanent character. It is expressly understood that all of these payments shall be made in lieu of the benefits provided in paragraphs 1 and 2 of Article 42 of Decree No. 55 of March 3, 1943. Likewise if the occupational illness is declared incurable or of a permanent character, such crew member shall receive such benefits as are provided in Article 44 of said Decree No. 55, according to the degree of his permanent incapacity caused by such occupational illness.

For the purposes of this Article the term "occupational illness" shall be understood to mean any illness which a crew member may contract on board the ship as the immediate consequence and direct result of the work that he performs on board. Hence, any other illness not falling within this definition does not confer any rights to the benefits provided in this Article but are controlled by the provisions of Article 7 and paragraph (a) of Article 14 of this contract.

15. REPATRIATION: Whenever any member of the crew is left on shore, *in a port other than the port of engagement*, due to his illness, injury, discharge, shipwreck, or for any other cause, the Company shall repatriate him for its own account to the port of engagement, or to the port where the voyage began, or to the port which he and the Company may mutually agree upon. Such repatriation shall [fol. 16] cover only the cost of transportation and maintenance of the seaman during the trip. If the seaman is able to work, the Company may discharge its obligation to repatriate him by providing him employment aboard any Company vessel proceeding to the port of repatriation.

16. HOURS OF WORK: The hours and working conditions for members of the crew shall be as follows:

(a) *Deck and Engine Department:*

The regular working hours for day workers will be eight hours per day, Monday through Fridays and four hours on Saturdays in the forenoon, both at sea and in port. Overtime will be paid for any work in excess of eight hours per day Monday through Friday, and work in excess of four hours on Saturday and for any work performed on Sunday or holidays, at the overtime rate stipulated in paragraph (h) of this article.

The regular working hours for men on watch shall be eight hours per day at sea and in port provided, however, that overtime will be paid for any work in excess of 8 hours per day and for work performed in any port on Saturday afternoon, Sundays, or Holidays at the overtime rate stipulated in paragraph (h) of this article.

(b) *Steward's Department:*

The regular working hours for members of the Steward's Department shall be eight hours daily in a spread of fourteen hours both at sea and in port provided, however, that any work performed in excess of such hours and any work performed in any port on Saturday afternoon, Sunday or Holidays shall be paid for at the overtime rate stipulated in paragraph (h) of this article.

(c) At sea and in ports other than Honduran and Continental U.S. Ports no work other than usual routine duties shall be performed on Sundays or Holidays.

(d) Holidays:

The following Holidays will be observed: January 1st, March 15th, April 14th, May 1st, September 15th, October 3rd, October 12th, December 25th, Holy Thursday, Good Friday, and Saturday of Holy Week.

(e) Stevedoring Cargo:

Any work performed by members of the crew in connection with the stevedoring of cargo, will be paid for at the overtime rate stipulated in paragraph (h) of this article.

(f) DRILLS:

Boat and fire drills and other emergency work performed for the safety of the ship, its passengers, its crew or cargo or for the salvaging or aiding of other vessels in distress including their crew, passengers and/or cargoes shall not be considered overtime no matter when or where performed.

(g) COMPUTATION OF OVERTIME:

Overtime shall be computed on the basis of half-hour periods, it being understood that any fraction of half-hour shall be considered a full half-hour.

[fol. 17] (h) OVERTIME RATE:

The overtime rate for all departments shall be ($1.00) one dollar per hour U. S. Currency or its equivalent in Lempiras or in the currency prevailing in the place of payment and the said overtime shall be paid in cash at the completion of each voyage.

(i) The Boatswain and/or Carpenter shall perform the usual routine soundings and inspections on Saturdays, Sundays and Holidays without the payment of overtime.

(j) It is mutually understood and agreed that a vessel shall not be considered in port while at anchor. Nevertheless, when the vessel is anchored on a Saturday afternoon, a Sunday or on any of the holidays stipulated in section (d) of this article crew members will be paid for work done in accordance with sections (a) and (b) of this same article.

17. The purpose of the contracting parties in signing this contract is to continue working in complete harmony and cooperation for their mutual benefit, and principally to continue fomenting the development of the Honduran Merchant Marine to the end that it may occupy its proper place in the international maritime commerce.

18. Both parties being fully aware of the unsettled world-wide conditions and being desirous of protecting the interests and providing for the welfare of the seamen employed by the Empresa Hondurena de Vapores, S. A., in the event that the vessels owned by the Company should during the life of agreement, operate under war

conditions, do agree that in that event the seaman employed on vessels operated by the Empresa Hondurena de Vapores, S. A., will be paid the identical bonuses percentage-wise and the identical compensation for death as a result of war hazard and or temporary and or permanent disability as a result of war hazard and loss of personal effects as are paid to seamen employed in the Merchant Marine of the United States.

During the period that any vessel of the Company is under charter to any agency of the United States Government, the members of the crew of such vessels, in lieu of the benefits mentioned in the paragraph above, shall be entitled to the bonuses and to the benefits for death, body injury, loss of personal effects and internment resulting from risk of war or war-like operations, as may during the term of such charter be provided with respect to the crews of vessels documented under the laws of the United States and under charter to any agency of the United States Government and during the period that the payment of such benefits are insured or assumed by the charterer, the Company shall be relieved of any and all liability to the members of the crew or their beneficiaries under the provisions of this agreement.

Whenever any of the foregoing contingencies should take place, the Empresa will notify the Sociedad of such occurrences.

19. TERM OF CONTRACT:

This contract shall become effective at 12:01 A. M. April 16, 1957, and shall remain in full force and effect until midnight of April 15, 1959, and shall be considered automatically renewed for an equal term and so on successively if before 30 days prior to its expiration date one of the contracting parties has not notified in writing the other party its decision to terminate the contract; it being expressly agreed and understood that the contract entered into between the same contracting parties on April 11, 1955, is hereby terminated as of midnight April 15, 1957.

[fol. 18] IN WITNESS WHEREOF, Mr. Francisco Cosenza Arevalo, in his character of President of the SOCIEDAD

Nacional de Marineros de Honduras and in accordance with the faculties vested in him by the by-laws of the said Sociedad in Chapter 111, Article 27, Paragraph (ch) and Mr. Joseph Felix Aycock in his character of President of the Empresa Hondurena de Vapores, S. A. duly authorized therefor, signed this contract before two witnesses, in the city of Puerto Cortes, Sectional District of Puerto Cortes, Department of Cortes on the 29th day of March nineteen hundred and fifty seven.

J. F. Aycock
President of the
"Empresa Hondurena de Vapores, S. A."

F. Cosenza
President of the
"Sociedad Nacional de Marineros de Honduras"

Efrain Alcantara
Witness

F. B. Acosta
Witness

[fol. 19] The undersigned Notary Public, with residence at the present time in the city of San Pedro Sula, D. D., Department of Cortes, and at present in this Port

CERTIFIES: That the signatures which read: "J. F. Aycock" and "F. Cosenza", appearing at the end of the Collective contract for Maritime Work, entered into between the EMPRESA HONDUREÑA DE VAPORES, S. A., and the SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, are authentic and have been placed thereunto in his presence by Messrs. JOSEPH FELIX AYCOCK and FRANCISCO COSENZA AREVALO, in their character of Presidents, respectively of the aforesaid societies, and that they are personally known to him: and HE FURTHER CERTIFIES: That the signatures which read "Efrain Alcantara" and "F. B. Acosta" and which likewise appear at the end of the aforesaid contract are authentic and have been placed thereunto in his presence by Messrs. Efrain Alcantara and Francisco B. Acosta whom he knows personally and who sign said document in their character of witnesses.

IN WITNESS WHEREOF he signs and seals these presents in Puerto Cortes, Sectional District of the same name, Department of Cortes, on the 29th day of March nineteen hundred and fifty seven.

.....

Guillermo Moncada
Notary

[fol. 20] EXHIBIT 2 TO COMPLAINT

(Translation)

MINISTRY OF STATE FOR LABOR AND SOCIAL WELFARE

CERTIFICATION

THE UNDERSIGNED SECRETARY OF THE MINISTRY OF STATE FOR LABOR AND SOCIAL WELFARE in the action initiated by virtue of the petition presented to this Ministry of State by Mr. Joseph Felix Aycock, in his capacity as President of the Empresa Hondureña de Vapores, S.A., CERTIFIES: the opinion and decision literally state:

"The undersigned Chief of the Legal Section of the Office of the Inspector General of Labor, in accordance with the preceding decision, hereby submits the following OPINION.—The Republic of Honduras is an Independent and Sovereign State with its own nationals and territory, legally established, subject to and obeying a Constitution and the laws and regulations derived therefrom and which in conjunction form the Honduran Judicial System. As a State which it is, it is Sovereign, a factor which is of extreme importance in International Law and which forms the fundamental basis for the Opinion which is herein expressed, for as there is no other judicial power of a higher hierarchy than that of Sovereignty, there exists only the self-imposed limitations of the individual States which gives a reason for the peaceful coexistence of these States within the Judicial System known as Public International Law. If this were not the case, it would be possible for the government of one nation, for example, to dictate unilaterally dispositions which could affect the sovereignty and jurisdiction of another state; which, in turn, and as reprisal, could dictate dispositions covering matters which legally pertain to the first and thereafter successively until the entire civilized world would be transformed into a state of chaos due to constant tensions and innumerable wars, depending upon the power of some and the weakness of others. Fortunately, man has found

the means of voluntarily imposing a limitation upon the Sovereignty of each State by means of international treaties, or simply by unilateral action under the existing laws. We have, therefore, Honduras, a civilized country, respectful of International Law which, in accordance with Article 11 of its Constitution has adopted and recognizes as its own the principles and practices of an international order which recognize the community of man and the sovereignty of nations and their desire for peace and universal democracy, and to such extent it would never presume to order the other Central American Republics to alter in any way their political status, the control over their people or their judicial institutions, or even to attempt to have their courts decide in any given manner matters over which they have jurisdiction, or even to attempt to take from the jurisdiction of these foreign courts matters which in accordance with their own jurisprudence, are wholly within their jurisdiction, and we could go on and on and mention many other instances of possible inferences in questions of International Jurisprudence which would only be limited by one's imagination. However, we repeat that man has found the solution to this problem because there exist internally laws which restrict the actions of each State, International Codes which resolve conflicts of law and finally International Conventions which proscribe the intervention of one State in the internal affairs of another, which condemn the [fol. 21] theory of rule by the strongest and raising to a very high plane the concepts of law and the peaceful solution of international controversies. Article 6 of the Constitution of the Republic of Honduras fixes the national territorial boundaries in such a detailed manner and conforms these with the decisions of arbitration commissions that the Honduran authorities charged with the enforcement of laws with regard to specific cases would never reach the extreme of usurping the rights and actions of other States by virtue of an error in political geography. The doctrine and conventions relating to private International Law, for example, the Bustamante Code, approved by the 6th Inter-American Conference at Havana, Cuba, in 1928, refers to the following classification

of laws. 'I. Those applying to persons by reason of their domicile or their nationality and following them even when they go to another country termed personal or of an internal public order; II. Those binding alike upon all persons residing in the territory, whether or not they are nationals termed *territorial, local or of an international public order;* III. Those applying only through the expression, interpretation, or presumption of the will of the parties or of one of them, termed voluntary or of a private order.' Private International Law recognizes among those laws which are classed as territorial the Political Constitutions and Labor Laws, in addition to criminal and administrative and procedural law; that is to say, these laws are applied equally to those who reside within the territory of the State in question without regard to nationality. This means that a worker or an employer domiciled in Honduras, even though they may be foreigners or have tried voluntarily to free themselves from the jurisdiction of the *territorial* laws of Honduras, cannot limit the celebration of a work contract to the laws of a foreign country. Much less can a foreign judicial body declare itself competent to consider a labor matter originating in Honduras, as we will demonstate further on. It is established, therefore, that the provisions of a constitutional or labor character, among others, have the nature of being territorial laws and obligate all persons residing in Honduras without regard, as is reasonable, to the personal laws of individuals, under which it would be possible to grant the application of certain foreign legal provisions within the national territory, for example, those relative to the civil status of persons. As we are actually concerned with the substantive aspects of the problem presented by the Empresa Hondureña de Vapores, S.A., we will refer to the Charter of the Organization of American States subscribed to generally by all of these countries and specifically by the United States of America and the Republic of Honduras on April 30, 1948, in the City of Bogotá, Republic of Colombia. In Article 5 of this Charter there is contained a reaffirmation of the principles by the American States and under paragraph b) of said Article they re-

affirm that '(b) International order consists essentially of respect for the personality, *sovereignty* and independence of States, *and the faithful fulfillment of obligations derived from treaties and other sources of international law.*' As an example of the limitation of the Rule by the Strong which distinguishes us today from those who lived in the dark ages of man, Article 6th of the Charter proclaims that 'States are juridically equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties. The rights of each State depend not upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law.' Strengthening the above principle, Article 7 of the Charter imposes the following obligation: 'Every American State has the duty to respect the rights enjoyed by every other State in accordance with international [fol. 22] law', and in Article 8 the Charter states that 'The fundamental rights of States may not be impaired in any manner whatsoever.' We affirm that one of the fundamental rights of a modern state is its unrestricted rights with respect to its own legislative, administrative and judicial functions with respect to its own area and the validity of its laws. The above citations are enough to demonstrate the illegality of the action on the part of the National Labor Relations Board of the United States when it sought to exercise jurisdiction over a matter which is properly within the jurisdiction of Honduran Courts, in that without any logical reason whatever it ordered that the Empresa Hondureña de Vapores, S.A. recognize an American Maritime Union as the representatives of that Company for the negotiation and execution of a collective bargaining contract; however, we feel that it is our duty to study this matter further with respect to the Charter of Organization of American States and point out that its terms and conditions obligate all Nations of this Continent, whether they be large or small, strong or weak. We place specific emphasis on the following articles: 'Article 12. The jurisdiction of States within the limits of their national territory is exercised equally over all the inhabitants, whether nationals or aliens.' Article 15. 'No State or group of States has the right to intervene, di-

rectly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.' As you can see, we have now reached the question of jurisdiction. Would the Government of the United States recognize as being legal the action by a Judge of the Republic of Honduras which would tend to bring under his jurisdiction matter X which properly should fall within the jurisdiction of the Courts of the United States? If by the mere fact that there are Honduran seamen who serve on ships which sail under the flags of the United States would this give to the Government of Honduras jurisdiction over labor matters involving these seamen, and would the Government of the United States consider it as being legal, realizing that its labor laws are territorial in nature and as a result applicable to the last inch of United States territory and to the ships which fly its flag for the reason that these ships are an extension of its national territory? We think that the answer would be in the negative and therefore it is reasonable to assume that the Government of Honduras would also refuse to accept as valid any decision handed down by any Court of any foreign country which attempts to apply to persons having their domicile in Honduras and who in accordance with the classification of laws above cited are subject to the jurisdiction of its territorial laws. The Constitution of the Republic, which is the source of International Law, establishes in Article 122 the jurisdiction over labor matters and states that it shall have jurisdiction over all controversies which originate as a result of the relations between capital and labor and states clearly that the respective laws shall establish the norms of this jurisdiction and the agencies which shall be responsible for putting them into effect. The law has effectively established the jurisdiction over labor matters creating courts and tribunals necessary to mete out justice in labor matters. In the City of Puerto Cortes, situated in the Department of Cortes, which is a part of the national territory, there is a Labor Court and within its jurisdiction is the domicile of the Empresa Hondureña de

Vapores, S.A., as well as the domicile of the seamen who work for this Company. Therefore, any controversies which arise between these parties are subject in accordance with the provisions of the Constitution and the law, to said Labor Court. We take into consideration that the [fol. 23] ships of any nation actually constitute an extension of the national territory of that nation. We can show that the National Maritime Union of the United States under the provisions of the Labor Code in force in Honduras is not legally the representative of the workers of the Empresa Hondureña de Vapores, S.A., but we are not concerned with this matter, but merely wish to demonstrate, as we have demonstrated, the illegality of the resolution handed down by the National Labor Relations Board of the United States, based on the irrefutable argument that *it does not have jurisdiction over the matter which it has attempted to resolve*. As this 'Decision' stands, in the future the Government of the United States will have to recognize that all decisions handed down by the Courts or Tribunals of Honduras which involve conflicts between Honduran seamen on ships of the United States Merchant Marine shall be valid; this situation would merely be with respect to Honduras, for it is very easy to imagine that a like position could be taken by other countries stronger than Honduras and we feel certain that this would not be well received by the United States of America. The Bustamante Code, in Article 423, paragraph 3, establishes that 'Every civil or contentious administrative judgment rendered in one of the contracting States shall have force and may be executed in the others if it combines the following conditions: That the judgment *does not* conflict with the public policy or the public laws of the country in which its execution is sought.' The resolution handed down by the National Labor Relations Board of the United States referred to in the petition of the Empresa Hondureña de Vapores, is in conflict with the Constitutional, Labor and Procedural Law of Honduras, which are all a matter of Public Law. In conclusion, we have reached the following opinion with respect to the Petition filed by the Empresa Hondureña de Vapores and state as follows: 1. That in accordance with

the Labor Laws of Honduras a foreign Tribunal or agency cannot intervene in a labor matter which involves a Honduran shipping company and the seamen who work on its ships which fly the Honduran flag, as we consider that these ships are actually merely an extension of the national territory; 2. That no foreign union can represent the interests of seamen who work on ships sailing under the Honduran flag; 3. That any resolution or decision of a foreign tribunal or agency which conflicts with what has been expressed under 1 and 2 above, is null and void in accordance with the Honduran Constitutional, Labor and Procedural Law. Tegucigalpa, D. C., December 7, 1961. (Signed) ADALBERTO DISCUA R., Chief of the Legal Section of the Office of the Labor Inspector General.

"MINISTRY OF STATE FOR LABOR AND SOCIAL WELFARE. Tegucigalpa, Central District, December 8, 1961. I hereby approve in all parts the opinion handed down by the Legal Section of the Office of the Inspector General of Labor. Extend a certified copy to the interested parties. EXECUTED. OSCAR A. FLORES (Seal) Minister of State for Labor and Social Welfare. ANGEL LEVY CASTILLO—Seal of the Secretary's Office."

Extended in Tegucigalpa, Central District, the 8th day of December 1961.

(SEAL)

ANGEL LEVY CASTILLO
(SEAL) Secretary of the Ministry of Labor

Approved

/s/ Oscar A. Flores
Minister of Labor

[fol. 24] EXHIBIT 3 TO COMPLAINT

134 NLRB No. 25 D-2594

New York, N. Y.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 2-RC-10379

UNITED FRUIT COMPANY

and

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

Decision and Direction of Election.

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Jacob Lazarus, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record of this case,[1] the Board finds:

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[1] On May 31, 1960, the Board held a consolidated hearing for purposes of oral argument in *West India Fruit and Steamship Company, Inc.*, 130 NLRB No. 46, *Peninsular & Occidental Steamship Company*, 132 NLRB No. 2, and *Eastern Shipping Corporation*, 132 NLRB No. 72, on certain issues concerning the jurisdiction of the Act over ships flying the flags of nations other than the United States and concerning policy considerations involved in the Board's assertion of jurisdiction over such vessels. Similar issues are raised in this proceeding. Thus, as it appeared that United Fruit Company, the Petitioner, and Sociedad Nacional De Marinos Honduras, a Honduran organization, might have a substantial interest in the outcome of the *West India* and other cases referred to above, they were invited to participate as *amicus curiae* in the oral argument. Only the Petitioner accepted the invitation and appeared by counsel at the hearing. See, *West India Fruit and Steamship Company, supra*, pp. 1-2, footnote 5.

As set forth in our decision in the *West India* case, *supra*, p. 2, fn. 4, the Attorney General of the United States was permitted

1. The Petitioner seeks a single fleet-wide unit of all unlicensed seamen employed aboard certain Honduran flag vessels which it alleges are beneficially owned and controlled by the United Fruit Company, here called UFCO, through its wholly owned foreign subsidiaries, Empresa Hondurena de Vapores, S.A.[2] and Balboa Shipping Corporation. UFCO contends that it is not, as alleged, the employer of the seamen involved and neither owns nor, as a time-charterer, operates the ships covered by the petition. Both UFCO and Empresa argue basically that as Empresa is a foreign corporation, is the employer of the seamen, and is engaged in its own business of operating and chartering the vessels, and as the vessels are of Honduran registry and the seamen of foreign nationality, the maritime operations involved are not within the jurisdiction of the Labor Act. Thus, the issue raised [fol. 25] here concerns not only the effect upon the Act's jurisdiction of the foreign aspects adhering to Empresa's maritime operations, but also a determination of the relationship of Empresa and its operations to UFCO and its shipping trade.

As for the companies' arguments based upon the flag law and other international law doctrine and upon certain treaties and conventions between the United States and Honduras, such matters were dealt with at length in the Board's decision in *West India*. It was there concluded that the presence of such matters does not necessarily preclude the Act's coverage of a given maritime operation.[3]

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to intervene in this and the other three cases referred to above and in his brief, filed on November 18, 1960, presented on behalf of the Department of State and Department of Defense certain considerations of international law and national defense policy bearing upon issues common to the four cases.

[2] Empresa Hondurena de Vapores, a Honduran Corporation, moved to intervene on the ground that it was the employer of the employees covered by the petition. Empresa was, without opposition, permitted to intervene at the hearing and has participated fully at all stages of this proceeding.

[3] The treaty and consular conventions with Honduras are substantially the same as those with Liberia considered in the *West India* decision at pp. 19-21.

Similarly in the *Peninsular and Occidental*[4] and in the *Eastern Shipping*[5] cases it was held that the foreign incorporation of the legal owner and operator of a vessel and apparent employer of its crew did not alone take the vessel beyond the reach of the Act's jurisdiction.

However, none of these cases supports the proposition, in effect urged upon us here by the Petitioner, that underlying stock or other beneficial ownership and, thus, ultimate control of a foreign corporation and its operations by domestic United States interests necessarily bring the foreign corporation or its operations within the coverage of the Act. We do not read the Act as necessarily following United States investments abroad. It is the commerce of this nation, not of foreign nations, with which the Act is concerned. Also we are aware that international seaborne commerce will by its very nature involve insofar as this nation is concerned trade or transportation between foreign nations and a State. Nothing in the Act or relevant cases suggests, however, that all seaborne commerce reaching our ports on regular runs or sporadically is within the Act's coverage irrespective of other aspects of the operations.[6] In following the Supreme Court's *Lauritzen* decision,[7] the Board has pointed out that the test of jurisdiction given commerce literally within Section 2(6) is whether there exist substantial contacts between the "foreign" maritime operation and important United States interests.[8] Rather the problem is one of evaluating the many aspects of the operation and determining whether or not the shipping involved is essentially that of this nation and not that of a foreign nation which the exigencies of international trade have brought in contact with

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[4] 132 NLRB No. 1, at 5.

[5] 132 NLRB No. 72, at 5-6.

[6] See, *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U.S. 138 (1957); also, *Lauritzen* v. *Larsen*, 345 U.S. 571, 581 (1952).

[7] *Lauritzen* v. *Larsen*, *supra*.

[8] E.g., *West India*, *supra*, p. 15; *Eastern Shipping Corporation*, *supra*, at 2.

[9] *West India*, *supra*, 15; *Eastern Shipping Corporation*, *supra*, p. 6.

the United States.[10] Such a view clearly lends itself to the result that a foreign maritime operation can retain its essentially foreign nature and remain the commerce of a foreign nation outside the coverage of the Act despite underlying United States interests and certain commercial contacts with this country. At the same time, this view looks beyond the formal foreign aspects to determine if the maritime operation is in fact one primarily based in and operating out of the United States or essentially an adjunct of a domestic corporation's operations in the [fol. 26] international trade of the United States, and, thus is the shipping of this nation and, consequently, covered by the Act. It follows, as we emphasized in our *West India* decision (at pages 21 and 31) and as we re-emphasize here, that the particular flag or nationality of the vessels involved, as such, plays no role in our determinations. Whether the flag or nationality be from our own hemisphere or across the seas, the controlling criteria are the same.

It is in the light of these considerations that we must approach the facts and issues before us in deciding the jurisdictional question. UFCO is a New Jersey corporation with its principal place of business at Boston, Massachusetts. Of its approximately 8.7 million outstanding shares of stock, over 8.5 million are owned by citizens of the United States. Its business interests extend world-wide and involve a rather diverse group of activities. However, it is primarily concerned with the raising of bananas, sugar, cacao and other tropical produce and with their transportation to market and sale. The bulk of its trade is between Central and South American locations and United States ports, and the value of its imports into this country exceed one million dollars annually, and are carried in large part on ships either owned or chartered by UFCO, including those subject of the present petition.

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[10] Thus, in both the *Eastern Shipping* case at p. 5 and in *Hamilton Bros.*, 133 NLRB No. 85, p. 3, the Board noted in finding the Act applied that the U. S. contacts present were not just the result of the foreign seaborne trade of a truly foreign venture.

Though it is an operating company, UFCO also to a large extent carries out its operations through some fifty or sixty subsidiaries, many of which are foreign corporations such as Empresa, the subsidiary involved in this proceeding. The primary purpose of UFCO's operating through subsidiaries is to achieve, as its vice-president explained in his testimony, a decentralized control of the companies' many activities in which the subsidiaries, more or less specializing in particular types of undertakings, deal with the day-to-day problems of their operations while over-all policy and development control resides in the parent company. The extent and nature of that control is the subject of sharp disagreement between the Petitioner and the companies. But the record shows that, though day-to-day operations are in fact handled by the subsidiaries themselves, long-range plans concerning expansion, contraction or other changes in the operation of subsidiaries are generally controlled by UFCO and its decision with respect to such matters is based not so much upon the needs or advancement of the subsidiaries as independent corporations, but rather upon the needs and planned development of UFCO's overall business in the production, transportation and sale of tropical produce.

Empresa is, as noted, one of UFCO's wholly-owned subsidiaries. It was organized under the laws of Honduras in 1941 by UFCO which supplied the capital for the venture. Empresa's officers are elected by its directors who are in turn elected by the sole stockholder, UFCO. There are, however, no interlocking directors with, or officers common to, Empresa and its parent. Furthermore, Empresa maintains all its own records, holds real estate in its own name, and otherwise appears to function as a distinct corporate entity. It is engaged in the business of owning and operating vessels registered under the laws of Honduras. However, it does not carry passengers or cargo on its own account. Rather, since its incorporation it has time chartered all its vessels and its income from its maritime operations, which exceed $400,000 annually, is derived wholly from the charter fees. But Empresa does not, as the record shows, hold itself out to the shipping world generally as being engaged in the business of chartering

vessels. On the contrary, since its formation its business [fol. 27] has been limited with but a few possible exceptions [11] to chartering its vessels to UFCO, and the seventeen ships under its control at the time of the hearing and which are the subject of the petition [12] were so chartered.

As the owner and operator of the vessels under time charter, Empresa must provide ships that are fully equipped and ready to put to sea. Thus, it is responsible not only for the physical condition of the ships [13] and for provisioning them,[14] except for fuel, but also for hiring the officers and crews [15] and handling all matters concern-

[11] It was stated in the record by several Company witnesses that Empresa chartered its vessels to UFCO and no other company. However, an exhibit shows that certain of the vessels had, on relatively rare occasions, been under charter to companies unrelated to UFCO; but, whether Empresa itself had so chartered the vessels or whether they were in fact rechartered by UFCO to the stranger companies does not appear. In either event, it remains clear that Empresa does not look to the general shipping market but rather to UFCO for the chartering of its vessels.

[12] Empresa owned 14 of these vessels. Three were owned by Balboa Shipping Corporation, a Panamanian Corporation wholly owned by UFCO. Empresa is the managing agent of such vessels which, like its own ships, fly the Honduran flag. Balboa is not at this time directly involved with the operation of its three vessels which are, for all practical purposes, as fully under Empresa's control as are its own vessels. As Empresa's control over the vessels of Balboa appears to be the same as that over its own vessels, it is unnecessary for the purposes of this decision to distinguish between the two groups of vessels. We note, moreover, that it is not contended that jurisdiction over Balboa's vessels turns on factors other than those also applicable to Empresa and its vessels.

[13] Empresa is responsible not only for day-to-day upkeep of the vessels but also for having the ships drydocked and repaired. Both are usually done in the United States. However, betterments for vessels or the purchase and scrapping of vessels are matters usually falling within the over-all policy control of UFCO.

[14] Supplies are purchased both in foreign nations and the United States. Most of what it buys in this country is purchased from Maratrop Trading Corporation, a wholly owned UFCO subsidiary.

[15] The crews are hired in Honduras, are composed almost wholly of citizens of that country, and sign Honduran shipping articles

ing terms and conditions of employment including payment of wages and discipline of the personnel.[16] There is nothing in the record to suggest that Empresa does not in fact carry out these typical responsibilities of the owner of a vessel under a time charter.

UFCO, as the time charterer of the vessels, determines what voyages they shall make, their ports of call, their length of stay in various ports, and what cargoes they shall carry. In exercising its control, UFCO deals directly with the captain of the vessel involved. If it is dissatisfied with the handling of a vessel by its officers or crew or with its mechanical or other condition, it directs its complaints directly to Empresa, which is responsible for making any necessary changes. The ships are used, for the most part, to carry produce of UFCO's Latin American operations,[17] and on any given trip may call at ports in various Central and South American countries including those of Honduras. As the bulk of the trade is between such countries and the United States, the vessels regularly call at the ports of this nation. On their return trips to Latin America the ships carry cargo for various UFCO subsidiaries and also general cargo for shippers and consignees outside the UFCO organization.

[fol. 28] The record further shows that the Empresa vessels are wholly integrated in UFCO shipping operations. Thus, UFCO bareboat charters from one of its U. S. subsidiaries or owns outright a number of cargo ships registered under the laws of the United States. These ships, like Empresa's, are, under the jurisdiction of UFCO's Marine Division, and the two groups of vessels are used interchangeably, carrying the same types of cargos and calling at the same ports, both domestic and foreign. In assigning a vessel to a particular run, the determination as to which vessel to use is based on its availability, size and speed, not on its ownership or flag.

The facts, outlined above, show that the maritime operations before us come literally within the Act's definition of

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[16] Empresa, as part of its control over personnel, has bargained with a Honduran organization as the representative of the crews of its vessels. See below, fn. 22.

[17] Some, if not all, of the ships also carry passengers.

commerce as they encompass in large part, transportation and trade between foreign countries and States of this nation. They further demonstrate that the relationship between UFCO and Empresa is one in which the affairs of the subsidiary are designed essentially to further the shipping operations of the parent and not one in which Empresa is considered an independent undertaking whose success or failure is gauged by its role in the open market. Supporting this conclusion are, *inter alia*, (1) that Empresa's capital expenditures and other substantial changes in operations are tied to UFCO's sea-going transportation needs, both present and projected, (2) that Empresa, with but few possible exceptions, time-charters its vessels to UFCO only and does not look to the open market for business, and (3) that Empresa's vessels are utilized by UFCO as an integral and necessary part of its fleet of vessels and not chartered as an alternative to acquiring vessels elsewhere or only to meet particular contingencies that may arise.[18] Thus, the record shows that Empresa's maritime operations are a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation as described in Section 2(6) of the Act. It is also evident, and we find, that Empresa through its immediate authority and control over hiring and other terms and conditions of employment and UFCO through its control of Empresa and of the vessels and their operations are joint employers of the employees covered by the petition.[19]

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[18] In the situation where it or its subsidiaries' vessels cannot meet its needs, UFCO charters vessels from outside its family of companies. Also, it might be noted here that, in its annual reports, UFCO refers to the vessels involved in this proceeding as its own vessels and notes that certain vessels for foreign flag operations were built to its specifications, and so forth. There is nothing in such reports to indicate that UFCO considers the foreign flag vessels to be other than its own or to be otherwise than completely under its control.

[19] In so finding, we are not holding that a time charterer of a vessel is necessarily a joint employer of the vessel's crew irre-

We find, further, under the circumstances here that the maritime operations before us possess those substantial United States contracts which, under our decision in West India,[20] bring them within the jurisdictional coverage of the Act, despite the foreign registry of the vessels, [fol. 29] Empresa's foreign incorporation, and the other foreign aspects present.[21] Accordingly, we conclude that Empresa and UFCO and their maritime operations subject of the petition are in, and affect, commerce within the meaning of Sections 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding. Thus, the companies' motions to dismiss on jurisdictional grounds are denied.

2. The labor organizations involved claim to represent certain employees of the Employers.[22]

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spective of the other attendant facts.

As Balboa Shipping Corporation does not operate its three vessels time chartered to UFCO and does not hire or otherwise deal with the seamen on such vessels or affect their terms and conditions of employment and as Empresa has, as noted, authority over such matters, Balboa is not under the present arrangement an employer of the seamen on its vessels.

[20] 130 NLRB No. 46, pg. 14-15. Clearly, the United States contacts derive from the fact that the maritime operations involved are those of a domestic corporation. They are not the result of the international operations of a truly independent foreign maritime venture.

[21] See, also, *Peninsular & Occidental Steamship Co., supra; Eastern Shipping Corporation, supra;* and *Hamilton Bros., Inc., supra.*

[22] Following the close of the hearing in this case, Sindicato Maritimo Naccional De Honduras "Sindimar" sought to intervene in this proceeding on the basis of a card showing of interest. The Petitioner contends the request for intervention was not timely. We disagree, for the cards submitted in support of intervention were dated prior to the time of the close of the hearing. As we find that "Sindimar" is a labor organization, the motion to intervene is hereby granted. See, *Hamilton Bros. Inc.*, 133 NLRB No. . Sociedad Naccional De Marineros De Honduras was listed in the petition as the bargaining representative of the employees in the alleged appropriate unit and the record shows that, at the time of the hearing, a contract between Sociedad Naccional and Empresa covering the employees was then in effect. Copies of the petition, of the notice of hearing, and other formal

3. A question affecting commerce exists concerning the representation of certain employees of the Employers within Section 9(c)(1) and Section 2(6) and (7) of the Act.[23]

4. The following employees of the joint employers constitute a unit appropriate for the purposes of collective bargaining within Section 9(b) of the Act: all seamen employed upon the vessels owned or managed by Empresa Hondurena De Vapores, S.A., and jointly operated by the Employers, excluding guards, masters, other licensed officers, and all other supervisors.[24]

[fol. 30] DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because

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papers were not served on Sociedad Naccional. However, on June 7, 1961, the Board issued a notice, served on the parties and Sociedad Naccional, in which, *inter alia*, it accorded that organization a right to intervene and state its position on the issues by filing within 25 days a "Statement of Intervention" and a brief. As Sociedad Naccional did not reply to the notice, we conclude it is not interested in being a party to this proceeding, and we therefore do not consider it to be one.

[23] We find contrary to the contention of Empresa that its contract with Sociedad Naccional in effect at the time the petition was filed but expiring in April 1961 is not a bar to this proceeding, assuming it would otherwise be so effective because the decision herein is issuing after the expiration date of that contract. See: *St. Louis Independent Packing Company*, 122 NLRB 887, 889.

[24] The unit appears substantially as requested by the Petitioner. Empresa and UFCO did not contend the unit is inappropriate in either scope or composition, but object to the unit on the grounds considered above and found without merit, i.e., that UFCO is not an employer of the employees and that the Board is without jurisdiction in this case.

they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the elegibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by National Maritimes Union of America, AFL-CIO; or by Sindicato Maritimo Naccional De Honduras, "Sindimar;" or by neither.

Dated, Washington, D. C.

FRANK W. MCCULLOCH, Chairman
BOYD LEEDOM, Member
JOHN H. FANNING, Member
GERALD A. BROWN, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

PHILIP RAY RODGERS, MEMBER, dissenting:

For the reasons stated in my dissenting opinions in *West India Fruit and Steamship Company*, 130 NLRB No. 46, and *Hamilton Bros., Inc.*, 133 NLRB No. 85, I would dismiss the petition herein.

Dated, Washington, D. C.

PHILIP RAY RODGERS, Member
NATIONAL LABOR RELATIONS BOARD

[fol. 31] EXHIBIT 4 TO COMPLAINT

No. 109

November 29, 1961

Excellency:

With special instructions of my Government, I have the honor to call Your Excellency's attention to the decision rendered by the National Labor Relations Board, an Agency of the Government of the United States of America, in the city of Washington, in the case No. 2-RC-10379, entitled "United Fruit Company and National Maritime Union of America, AFL-CIO," dated November 15, 1961.

In this case the National Maritime Union of America, an American labor organization operating in this country, filed a petition with the National Labor Relations Board, with the final purpose to represent the unlicensed seamen working on vessels owned and operated by "Empresa Hondureña de Vapores, S.A.", a Honduran corporation recognized by Decree No. 1383 issued by the Ministry of Interior, Justice, Sanitation and Public Welfare of Honduras, on March 28, 1941, with principal office at Puerto Cortés, Republic of Honduras. The National Labor Relations Board decided favorable the petition of said Union.

My Government has taken notice of this decision with [fol. 32] very great concern, because the Board has paid no consideration to the fact that all those vessels fly the Honduran flag and are registered in the Honduras registry, and has also ignored the Treaty of Friendship, Commerce and Consular Rights between Honduras and United States, signed at Tegucigalpa, Honduras, on December 7, 1927.

Article X of the Treaty provides that merchant vessels and other privately owned vessels under the flag of either

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His Excellency
Dean Rusk,
The Secretary of State,
WASHINGTON, D. C.

of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

The National Labor Relations Board by asserting jurisdiction over the Honduran seamen aboard vessels carrying the Honduran flag has violated this provision that considers as vessels of Honduras those flying its flag.

It has also violated Article XXII of said Treaty which reads in part: "A Consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in case, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have [fol. 33] jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit".

The Articles X and XXII of said Treaty are very clear and there is not doubt that wages and contracts are matters dealing with internal order of the vessels, and are therefore subject exclusively to the laws of the State of registry and flag.

This decision has also ignored the following facts that were alleged during the proceeding: that the seamen employed by the Empresa Hondureña de Vapores, S.A. on its vessels are Honduran nationals and citizens of Honduras, hired in Honduras, with domicile in that country; that the seamen and the other employees of Empresa Hondureña de Vapores are subject to the laws of Honduras, and under the jurisdiction of the Honduras labor authorities; that the vessels owned and operated by Empresa Hondureña de Vapores, S.A., as well as their crews are subject to the Merchant Marine Law of Honduras; that those vessels regularly carry tonnage to and from Honduras and that said Empresa according to Honduras law is required to pay substantial incomes and other taxes to Honduras; that said Empresa Hondureña

de Vapores, S.A. is the sole employer of the unlicensed seamen working on its vessels and that the United Fruit Company, an American Corporation, has nothing to do in negotiating collective bargaining with Sociedad de Marineros de Honduras, a labor union representing the unlicensed seamen; that the United Fruit Company has nothing to do with the firing, promotions, assignment, discipline and other elements of control over the seamen; and that for 19 years since the inception of Empresa [fol. 34] Hondureña de Vapores, S.A., in 1941, said Empresa has negociated every collective bargaining agreement with the Honduran union, including the labor contract presently in existence.

I want to inform Your Excellency the Secretary of State that according to the Labor Law of Honduras "Código de Trabajo de Honduras", Honduras has exclusive jurisdiction over the relations of employers and employees working in its territory and in its ships flying its flag. This jurisdiction can not be renounced and the Honduras Government can never accept that a foreign Union like the National Maritime Union of America or any other represent the seamen of Honduras that work on vessels of Honduran flag. According to our Labor laws those seamen are represented by a Honduras Union properly established in that country and regulated by the National Labor Laws.

It is a well established principle of International Law that a vessel is subject exclusively to the law of the State of registry and whose flag it flies regardless of ownership and accordingly a domestic statute should never be construed to violate binding and effective principles of international law.

It is a fact that the American labor laws has been construed so as to limit its application to seamen on American flag vessel over which Congressional power is undoubted.

International Law recognizes that every State determines the nationality of vessels flying its flag through its domestic registration laws and that registration of vessels of foreign ownership may be permitted, and International Law recognizes the flag and registry of such vessels with

[fol. 35] the same force as that of any other vessel of the same flag and registry.

It also recognized that a vessel on the high seas and in a foreign port is subject to the exclusive jurisdiction of the State of registry apart from powers not relevant here, that every State has over foreign vessels in its waters.

I am perfectly aware that His Excellency the Secretary of State is well acquainted with all these principles, nevertheless I consider that in this occasion I should point out said principles.

In view of the Above considerations, and on behalf of my Government, with much regret, I want to protest, respectfully, but firmly against said decision of the National Labor Relations Board.

In taking this action, my Government, knowing that Your Excellency's Government is so deeply interested in the fulfillment of the international treaties, hopes that Your Excellency will take the appropriate measures to remedy this situation.

I avail myself of this opportunity to renew to Your Excellency, the assurances of my highest consideration.

CELEO DAVILA
Ambassador of Honduras.

[fol. 36] [File endorsement omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER AND INJUNCTION—Dec. 16, 1961

Plaintiff, Sociedad Nacional de Marineros de Honduras, moves the Court to enter a temporary restraining order and injunction in accordance with the attached Order as prayed for in the verified Complaint.

RHYNE & RHYNE

By /s/ Herzel H. E. Plaine
HERZEL H. E. PLAINE
400 Hill Building
Washington, D. C.

Attorneys for Plaintiff

December 16, 1961

[fol. 37] [File endorsement omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

TEMPORARY RESTRAINING ORDER—Dec. 16, 1961

It appearing to the Court from the verified Complaint filed in this proceeding by Sociedad Nacional de Marineros de Honduras, plaintiff, that the holding of the representation election on and after December 17, 1961, pursuant to the defendant National Labor Relations Board's decision in Case No. 2-RC-10739, prior to the determination of the legal issues which have been presented by plaintiff in this proceeding, will result in irreparable and incalculable injury to plaintiff;

It is therefore on motion of plaintiff, through their counsel,

ORDERED that defendant National Labor Relations Board and its agents be hereby prohibited from conducting an election among the members of plaintiff, this Order to be continued for the period of ten (10) days after the service of this Order on the defendants, unless within that time this Temporary Restraining Order is extended for good cause, and that the matter be set down for hearing on the 20th day of December 1961, at 10 A.M. in the United States Courthouse, District of Columbia.

[fol. 38] Provided, however, that this Order shall not become effective unless and until plaintiff files with the Court corporate security in the amount of $500.00 or cash or personal bond of plaintiff's attorney.

/s/ R. B. Keech
Judge

Dated this 16th day of December 1961, 12:07 p.m.
Washington, D. C.

/s/ R. B. Keech, J.

[fol. 39] [File endorsement omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION OF DEFENDANTS TO DISMISS THE COMPLAINT—
Filed Dec. 19, 1961

Defendants, by their attorneys, move that the complaint herein be dismissed and that plaintiff's request for an injunction be denied for the following reasons:

1. This Court lacks jurisdiction over the subject matter of the action.
2. The complaint fails to state a case warranting equitable relief.
3. The complaint fails to state a cause of action.

WHEREFORE, it is respectfully requested that the complaint be dismissed and that plaintiff's request for injunctive relief be denied.

/s/ Marcel Mallet-Prevost
MARCEL MALLET-PREVOST
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.,
this 19th day of December, 1961.

[fol. 39a] CERTIFICATE OF SERVICE
(omitted in Printing)

[fol. 40] [File endorsement omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER CONTINUING TEMPORARY RESTRAINING ORDER—
Dec. 21, 1961

This case came on to be heard on December 20, 1961 upon the motion of plaintiff for preliminary injunction and other relief on the verified complaint, and upon the motion of the defendants to dismiss the complaint. After argument by counsel for both sides in open court and good cause appearing to the Court that the temporary restraining order made in the case on December 16, 1961 at 12:07 P.M. by Hon. Richmond B. Keech, United States District Judge for the District of Columbia should be continued pending the Court's decision on the above motions,

It is therefore on motion of plaintiff

ORDERED that the defendants comprising the National Labor Relations Board and its agents and employes be and are hereby restrained and enjoined from conducting an election among the members of plaintiff (as heretofore directed by the Board's decision in Case No. 2-RC-10379) until the further Order of this Court on the above motion of plaintiff for preliminary injunction and upon the motion of defendants to dismiss said complaint.

This Order shall become effective immediately, the plaintiff having filed with the Court on December 16, 1961 security in the amount of $500.

/s/ Alexander Holtzoff
ALEXANDER HOLTZOFF, Judge

Dated: December 21, 1961

Approved as to form:

/s/ Norton J. Come
Counsel for Defendants
National Labor Relations Board

[fol. 41] DEPARTMENT OF JUSTICE
WASHINGTON

January 10, 1962

Honorable Alexander Holtzoff
United States District Judge
United States Courthouse
Washington 1, D. C.

Re: Sociedad National de Marineros
de Honduras v. McCulloch, et al.
Civil Action No. 4020-61

Dear Judge Holtzoff:

As a result of your inquiry I have sought to ascertain the views of the Department of State with respect to the Honduran Note of November 29, 1961 attached to the complaint in the above-entitled action. The Department of State informs me that, although the Department does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case.

We are sending copies of this letter to the counsel of record.

Sincerely yours,

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
[fol. 41a] Assistant Attorney General

cc: Herzel H. E. Plaine, Esq.
Rhyne and Rhyne
400 Hill Building
Washington 6, D. C.

Norton J. Come, Esq.
Assistant General Counsel
National Labor Relations Board
Washington 25, D. C.

H. Howard Ostrin, Esq.
Cooper, Ostrin and Devarco
655 Madison Avenue
New York, New York

[fol. 42] [File Endorsement Omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4020-61

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS,
PLAINTIFF

v.

FRANK W. McCULLOCH, Chairman, and PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, and GERALD A. BROWN, Members, NATIONAL LABOR RELATIONS BOARD, DEFENDANTS

OPINION—Jan. 18, 1962

Harzel H. E. Plaine, Charles S. Rhyne and Brice W. Rhyne, all of Washington, D. C., for the plaintiff.

Stuart Rothman, General Counsel; Marcel Mallet-Prevost and Norton J. Cone, Assistants General Counsel, for the National Labor Relations Board, of Washington, D. C. for the defendants.

H. Howard Ostrin, of New York, for intervenor National Maritime Union of America, AFL-CIO.

The question presented in this case is whether the National Labor Relations Board has authority to order that an election for the designation of representatives for the purposes of collective bargaining, be held among foreign seamen employed on foreign merchant ships that have occasion to visit American ports and that are owned [fol. 43] by a foreign corporation that is a subsidiary of an American corporation.

The National Labor Relations Board, on November 15, 1961, rendered a decision and issued a direction that an election be conducted among seamen employed on certain vessels flying the flag of Honduras and owned by a Hon-

duran corporation, the name of which is Empresa Hondurena de Vapores, S. A., generally known as Empresa, and which is a subsidiary of the United Fruit Company, an American corporation. The purpose of the election was to determine whether these seamen desired to be represented for purposes of collective bargaining by the National Maritime Union of America AFL-CIO, or by a Honduran labor union briefly known as "Sindimar", or by neither. The plaintiff, Sociedad Nacional de Marineros de Honduras, is a Honduran labor union and the bargaining agent of these seamen under the laws of Honduras. The name of the plaintiff was not to be placed on the ballot at the prospective election.

On December 16, 1961 the plaintiff brought this action against the members of the Board to enjoin and restrain them from conducting the election on the ground that in ordering it, the Board had exceeded its legal authority. A temporary restraining order was issued on the same day. A hearing was held on December 20, 1961. The National Maritime Union of America, AFL-CIO, was granted leave to intervene as a defendant, since it had been a party to the proceeding before the Board. A motion for a preliminary injunction and a motion by the defendants to dismiss the complaint for failure to state a [fol. 44] claim upon which relief can be granted were heard at length. A decision on these two motions was reserved in order to accord to the Department of Justice an opportunity to submit a statement as to its attitude and as to the position of the Department of State concerning the matter.[1]

The pertinent facts may be summarized as follows. Empresa is a corporation organized under the laws of Honduras, where it maintains its principal office and place of business. It owns and operates a fleet of seagoing vessels, which are registered under the laws of Honduras and fly the flag of that country. The crews of these ships are composed entirely of citizens of Honduras, with the

[1] The complaint is verified on oath and consequently is treated as an affidavit for the purpose of the motion for a preliminary injunction. No answering affidavits have been filed, although memoranda and briefs in opposition have been submitted.

exception of one person, who is a British subject. All of the seamen are members of a Honduran labor union, which is the plaintiff in this action, and which is briefly known as Sociedad. They were hired in Honduras under shipping articles executed in that country. Sociedad is recognized by the Government of Honduras as the sole collective bargaining agent of these seamen. Collective bargaining agreements are in effect between Empresa and Sociedad. Empresa is a subsidiary of United Fruit Company, a New Jersey corporation. The ships in question make voyages and carry freight between Central and South American ports, as well as between Central and South American ports and ports of the United States.

[fol. 45] On November 13, 1959, the National Maritime Union of America, AFL-CIO, filed a petition with the National Labor Relations Board, seeking to represent as a single unit all unlicensed seamen employed on ships owned by various subsidiaries of the United Fruit Company, including Empresa. Statutory authority for maintaining such a proceeding is found in 29 U.S.C. §159(c). The Union claimed that it represented a number of these employees. It does not appear whether the activity of the American Union was instigated by any of the seamen, or whether the Union was interjecting itself on its own initiative.

A series of hearings were conducted before an Examiner and the matter was then considered by the Board. Two years later, on November 15, 1961, the Board rendered a decision, in effect, granting the prayer of the petition and ordering an election, as has already been stated. The comprehensive and exhaustive opinion of the Board was substantially predicated on the propositions that the flag or nationality of the vessels should play no role in its determination; that the ships were actually controlled by United Fruit Company as a charterer; that the bulk of the trade conducted by the ships was between Central and South American countries and the United States; and that, consequently, this shipping was essentially that of this nation, and an adjunct of the operations of a domestic corporation in international trade of the United States. It was contemplated that the balloting would take place in

part on board each ship when it visited an American port, [fol. 46] and in part by mail, i.e. "absentee voting".

Honorable Celeo Davila, Ambassador of Honduras, promptly submitted a formal written protest, dated November 29, 1961, against the decision of the Board, in which he courteously but firmly called attention to the fact that a treaty between Honduras and the United States, signed on November 7, 1927, provided that merchant vessels under the flag of either of the contracting parties, should be deemed to be the vessels of the party whose flag they fly, both within the territorial waters of the other party and on the high seas. He also called attention to some of the other facts that have already been summarized and to certain principles of international law.

At the argument of the motions before this Court, a representative of the Department of Justice was present as an observer. The Court invited him to submit a statement of the views of the Government as to the merits of the Honduran note, and time was accorded for that purpose. Subsequently this Court received a formal communication from Honorable William H. Orrick, Jr., Assistant Attorney General, dated January 10, 1962, the pertinent portions of which read as follows:

> "The Department of State informs me that although the Department does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case.
>
> "We are sending copies of this letter to the counsel of record."

[fol. 47] Counsel for the National Labor Relations Board responded by a letter dated January 12, 1962, in which he took issue with the Department of Justice and the Department of State, and adhered to his original position that the Board had acted within the scope of its authority.

This disagreement between counsel for various agencies of the Government complicates the problem before the Court and requires more elaborate and exhaustive discussion than might otherwise be needed. The Attorney General, as the chief legal officer of the Government,

through his representatives, indicates that the Department of State is of the opinion that the jurisdiction of the National Labor Relations Board should not attach in this case. It is a reasonable inference that in transmitting the views of the Department of State, the Department of Justice was, in effect, approving or concurring in them. On the other hand, counsel for the National Labor Relations Board, which theoretically is also an agency of the Executive branch of the Government, strikes a dissonant note and seeks to uphold the jurisdiction of the Board. Ordinarily, the Attorney General, through members of his staff, or through the United States Attorney, appears in behalf of the Government. If there are any differences of opinion between Government agencies, they are generally adjusted intramurally, and the definitive position of the Government is presented to the Courts by the Attorney General through his representatives.[2]

[fol. 48] The anomalous situation presented in the instant case gives rise to some reflections on an interesting and significant development that in recent years has gradually taken place in the fundamental political institutions of this country. It is, of course, elementary that the Founding Fathers contemplated a tripartite division of the Federal Government, consisting of three coordinate branches. Being both profound scholars and practical realists, they derived their ideas in part from political philosophers, principally Montesquieu, and in part from their own actual experience. The advent of the administrative process, which was almost unknown in Anglo-American jurisprudence at the time of the Constitutional Convention, but which has been necessitated by modern social and economic developments, has affected this tripartite division. At times the administrative process is employed by Executive departments and agencies, such as the Department of the Interior, the Department of

[2] E.g. *St. Regis Paper Co.* v. *United States*, decided by the Supreme Court on December 11, 1961 (not yet reported). It is stated on page 8 of the slip opinion that the Solicitor General pointed out that the Government agencies were at loggerheads on the problem presented to the Court, but that he had concluded "on balance" to present a specific view.

Agriculture, the Department of Health, Education and Welfare, and others. It is also applied by regulatory Boards and Commissions. Beginning with the Interstate Commerce Commission, which was created in 1887, the number of such establishments has greatly grown. This development was particularly rapid in the years immediately following the great depression.

It was at first assumed that these Boards and Commissions were included entirely within the Executive branch of the Government. The Supreme Court in *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629, however, [fol. 49] held that to a considerable extent such regulatory bodies were independent of the Executive. Thus in order to secure their independence, members of such boards and commissions, unlike other appointees of the President, were not subject to removal by the President at will. Mr. Justice Sutherland in his learned and thoughtful treatment of this topic indicated that these agencies were in part quasi-legislative and in part quasi-judicial. It may well be that from the standpoint of political science and constitutional law, we are gradually evolving a Federal government divided into four coordinate branches, instead of three. This is not said in any critical vein, but merely in the interest of clarity of thought. It is entirely possible that the development will prove salutary. The law and political institutions cannot stand still or remain static.

The issue to be decided in this litigation, namely, the status of a merchant ship in a foreign port, lies in a field that has frequently been discussed by the courts as well as by publicists and commentators. These discussions are not always consistent with each other and some of them are difficult to reconcile. For example, there are divergent statements as to whether a merchant ship is a part of the territory of the country whose flag it flies when it is in the territorial waters of a harbor of a foreign country.

In *United States* v. *Rodgers*, 150 U. S. 249, 260, it was stated that as concerns transactions on board merchant [fol. 50] ships, the vessels "are deemed to be within the country of their owners. Constructively they constitute

a part of the territory of the nation to which the owners belong."

In *United States* v. *Flores*, 289 U. S. 137, 155, Mr. Justice Stone observed that a merchant vessel is deemed to be a part of the territory of the sovereignty whose flag it flies for the purposes of jurisdiction to punish crimes committed on board ship. It does not lose that character when in navigable waters within the territorial limits of another sovereignty.

In *Lauritzen* v. *Larsen*, 345 U. S. 571, 584, Mr. Justice Jackson emphasized the importance of this doctrine in trenchant terms (pp. 584, 585):

> "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.
>
> "This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it 'is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty'."

[fol. 51] On the other hand, expressions may be found to the effect that it is but a figure of speech to say that a merchant ship is part of the territory of the country whose flag it flies, even when the ship is in the territorial waters or a port of a foreign country.

The leading American decision on this general subject is *Wildenhus's Case*, 120 U. S. 1, in which the opinion was written by Mr. Chief Justice Waite. That case involved a homicide committed on board a Belgian merchant ship while it was moored at a dock in Jersey City. It was

held in a *habeas corpus* proceeding that the local New Jersey courts had jurisdiction of the crime, although both the culprit and the victim were subjects of Belgium and members of the ship's crew. As some of the statements in the opinion are basic to the topic here discussed, we shall quote from it at some length (pp. 11, 12 and 18):

> "It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement;
>
> • • • •
>
> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and *the general regulation of the rights and duties of the officers and crew towar's the vessel or among themselves.*[3] And so by comity it came to be generally understood among civilized nations that all matters of discipline and
> [fol. 52] all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the

[3] Emphasis supplied.

rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdiction.

"Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction."

To summarize the basic theory, matters relating to the peace of the ship or those on board, are to be dealt with exclusively by the sovereign of the home of the ship, while disturbances of the peace generally may be suppressed and the offenders punished by the local authorities. While this doctrine relates to the enforcement of the criminal law, the same principles would seem to be applicable to civil affairs. Although the principle is clear, it is not always easy or simple to draw the line and to determine on which side any particular transaction may fall.

The converse of the situation presented in *Wildenhus's Case*, was confronted in two later decisions of the Supreme [fol. 53] Court. In *Wildenhus's Case* a crime committed on board a foreign merchant ship in an American harbor, was deemed punishable by American courts if it disturbed the peace of this country. In *United States* v. *Rodgers*, 150 U. S. 249, and *United States* v. *Flores*, 289 U. S. 137, it was held that an American seaman committing a crime on board an American ship, while the ship was either in foreign territorial waters or in a foreign harbor, could be brought back to the United States and tried in a Federal court. The first of these two cases applied this doctrine to an assault with a dangerous weapon committed on board an American ship by an American seaman while the ship was proceeding through Detroit River, which was within the territorial waters of Canada. The second went so far as to sustain criminal jurisdiction of a Federal court over a murder of an American citizen by another American citizen aboard an American ship while at anchor in a port in the Belgian Congo. This conclusion

was reached in spite of the fact that at the time of the commission of the offense, the ship was attached to the shore by cables at a point two hundred and fifty miles inland from the mouth of the Congo River. Attention has been called to these few decisions in order to indicate the uncertainties of the subject and the vagueness of the limitations on the authority of the United States in respect to foreign merchant ships from the point of view of constitutional and international law, as well as from the standpoint of comity and policy.

It seems proper to commence a consideration of the specific problem that confronts the Court in this case with [fol. 54] a reference to the treaty between the United States and Honduras "of Friendship, Commerce, and Consular Rights", signed on December 7, 1927, and proclaimed on July 23, 1928, 45 Stat. 2618. Article X of the treaty provides as follows (45 Stat. 2625):

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, . . . shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown."

Article XXII, 45 Stat. 2634, provides, in part, as follows:

> "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. *Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.*[4]

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[4] Emphasis supplied.

It may be emphasized that this treaty expressly reserved to the country under whose flag a ship sailed, jurisdiction over adjustment of seamen's wages and contracts relating thereto.

The pertinent statutory provisions that define the power and authority of the National Labor Relations Board are found in the Labor Management Relations Act [fol. 55] of 1947, 29 U.S.C. §§ 141 *et seq.* In 29 U.S.C. § 159, it is provided that:

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rate of pay, wages, hours of employment, or other conditions of employment: . . ."
>
> . . . . . .
>
> "(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, . . ."
>
> . . . . . .
>
> "the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

The terms "commerce" and "affecting commerce" are defined in 29 U.S.C. § 152, subsections (6) and (7), as follows:

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country
[fol. 56] and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

The phraseology of the statute is sweeping and comprehensive. It contains no restrictions, limitations, or exceptions. There are instances, however, in which a statute is not to be construed literally if such an interpretation would defeat the legislative intent. There are certain canons of statutory construction that serve as guides and aids in determining the intent of the Congress and the meaning of statutes. These precepts must be considered and given appropriate weight depending upon the circumstances of each case.

First, if there are two possible constructions of a statute, one of which may give rise to a constitutional question while the other would not create such a problem, the latter should be preferred, *Crowell* v. *Benson*, 285 U.S. 22, 62; *I.C.C.* v. *Oregon-Washington Ry. Co.*, 288 U.S. 14, 40. To be sure, in the case at bar the plaintiff does not raise any constitutional issue but relies solely on what it urges to be the proper construction of the statute,—else it necessarily would have applied for the convening of a three-judge statutory court. Nevertheless, [fol. 57] such a question lurks in the background and its probable presence may well be weighed by the court in determining how the statute should be interpreted.

If at all possible, any construction of a statute that would be violative of the principles of international law should be avoided. Thus, Mr. Chief Justice Marshall had

occasion to observe that, "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains". *The Charming Betsy*, 2 Cranch 64, 118.

An Act of Congress, no matter how universal the scope of its terms may be, will ordinarily be confined in its operation and effect to the territorial limits of the United States, unless the contrary intention is clearly and affirmatively expressed. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357; *Sandberg* v. *McDonald*, 248 U. S. 185, 195; *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285; *Air Line Dispatchers Ass'n.* v. *National Mediation Board*, 189 F. 2d 685, 690; 89 U. S. App. D. C. 24.

Repeals by implication are not favored. In other words, a statute will not be construed to repeal by implication an earlier enactment if it is at all possible to reconcile both. *A fortiori* this principle applies when there is an apparent inconsistency between an Act of Congress and an earlier treaty. If at all feasible the Act of Congress will be so interpreted and applied as not to affect the provisions of the treaty. *Chew Heong* v. *United States*, 112 U. S. 536, 549; *Cook* v. *United States*, 288 U. S. 102, [fol. 58] 121; *Pigeon River Co.* v. *Cox Co.*, 291 U. S. 138, 160. In the *Cook* case, *supra*, it was said that "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed".

The literal meaning of a statute may not be followed and applied in such a manner as to produce an absurd result or one that is unreasonable and plainly at variance with the policy of the legislation as a whole. To avoid such a consequence, the courts will at times imply limitations and exceptions in a statute that the legislative body has not inserted. Thus it was said in *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459:

> "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. . . . This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a

> statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, make it unreasonable to believe that the legislator intended to include the particular act."

Among the many cases holding to the same effect, are *United States* v. *Kirby*, 7 Wall. 482, 486, and *United States* v. *American Trucking Association*, 310 U. S. 534, 542. In the *Kirby* case, it was stated (pp. 486-487):

> "All laws should receive a sensible construction. General terms should be so limited in their application [fol. 59] as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

It may be helpful to consider the construction and application of other Acts of Congress to foreign merchant ships entering American ports. For example, it was held that an Act of Congress prohibiting the making of advances of wages to seamen, did not apply to a foreign ship with a foreign crew putting in at an American port, if the advances had been made outside of the United States. This result was reached in spite of the fact that the statute contained no such exception, *Sandberg* v. *McDonald*, 248 U. S. 185. On the other hand, a law entitling seamen to receive one-half of accrued wages in every port that the ship entered, was held applicable to foreign ships while in an American port in respect, however, only to wages that had accrued. *Strathearn SS Co.* v. *Dillon*, 252 U. S. 348. It will be observed that the last mentioned case involved an action required to be performed in the United States, while the former held the statute inapplicable to activities that took place abroad.

The National Prohibition Act was held applicable to foreign merchant ships while in American ports, *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100. The Government,

however, did not attempt to prosecute personnel of such a ship for having intoxicating liquor on board, as perhaps [fol. 60] a literal construction of the statute might have permitted. The Government merely insisted on requiring that such liquor be sealed while the ship was in an American port. This contention of the Government was approved by the Supreme Court.

The Eight Hour Law governing employment on Government contracts was held inapplicable to Government work performed in a foreign country, even though the statute used the terms "every contract" and included no exceptions, *Foley Bros. v. Filardo*, 336 U. S. 281.

The Jones Act governing the rights of seamen to recover damages for personal injuries incurred in the course of employment, was held inapplicable to a member of the crew of a foreign ship who was injured while in a foreign harbor, *Lauritzen v. Larsen*, 345 U. S. 571. Again, no express exception was included in the statute. In the course of his opinion, Mr. Justice Jackson stated (p. 582):

> "But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contract which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

The question whether the Labor Management Relations Act of 1947 applies to foreign vessels operated by foreign seamen shipped under foreign articles, while the vessel is temporarily in an American port, was answered in the negative in *Benz v. Compania Naviera Hidalgo*, 353 U. S. 138. That case involved a ship that sailed into [fol. 61] harbor at Portland, Oregon. It was flying a Liberian flag and was owned by a Panamanian corporation. The crew was made up entirely of nationals of foreign countries, who had signed a British form of articles of agreement at Bremen. While the ship was at anchor at Portland, members of the crew went on strike and picketed the vessel. They designated the Sailors' Union of the Pacific as their collective bargaining repre-

sentative. The picketing was eventually stopped by an order of the court. An action for damages against the Union was filed by the owners of the vessel. The defendants urged that the trial court was without jurisdiction, on the ground that the Labor Management Relations Act had preempted the field. This contention was overruled and it was held that this statute was not applicable. The court indicated that it was not the purpose of Congress to resolve labor disputes between nationals of other countries operating ships under foreign laws (pp. 142, 143). The Court further stated that in order to construe this statute as applicable in such a delicate field of international relations there had to be present the affirmative intention of the Congress clearly expressed (p. 147).

This decision would seem to be dispositive of the issue presented in the case at bar, were it not for the contention advanced by counsel for the defendants and counsel for the intervenor that it was overruled, or at least limited, by the subsequent ruling of the Supreme Court in *Marine Cooks* v. *Panama S. S. Co.*, 362 U. S. 365. That case [fol. 62] involved a Liberian ship manned by an alien crew, whose employment contracts had been executed outside of the United States. The ship put in at Tacoma, Washington, for the purpose of delivering cargo. Marine Cooks and Stewards, AFL, an American Labor union, picketed the vessel. Its owner brought suit for an injunction against this activity. It was held that the Court lacked the power to issue such an injunction because of the prohibitions of the Norris-LaGuardia Act, which precluded the granting of injunctions in labor disputes except under certain circumstances. Counsel argued that since the Norris-LaGuardia Act was applicable, the situation must have been deemed to involve a labor dispute within the meaning of the Labor Management Relations Act. This reasoning is, however, a *non sequitur*. There may indeed be labor disputes outside of the scope of that Act and beyond the jurisdiction of the National Labor Relations Board. The Court expressly referred to the *Benz* case and did not disapprove it or narrow it in any way.

Finally, reliance is placed on *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, in which it was held that the Fair Labor Standards Act covered employees of American con-

tractors engaged in the construction of a military base for the United States in an area in Bermuda leased by Great Britain to the United States for ninety-nine years. The question determined by the Court, however, was solely whether the term "possession" as used in the Act to define it geographical coverage, should be construed as com- [fol. 63] prizing a base leased by the United States in a foreign territory for a long term. This question was answered in the affirmative as against a vigorous dissenting opinion written by Mr. Justice Jackson and in which three other members of the Court concurred. The case has no bearing on the problem confronted in this case.

This Court, therefore, reaches the conclusion that the Labor Management Relations Act of 1947, should be construed as not conferring any authority or power on the National Labor Relations Board to conduct elections for collective bargaining purposes among foreign seamen manning vessels flying a foreign flag, and employed under contracts executed in a foreign country pursuant to foreign law. The fact that the corporation that owns the ship may be a subsidiary of an American corporation does not affect this result. Consequently the Board was without power or authority to issue the order directing the election in this instance.

Accordingly, the plaintiff's motion for a preliminary injunction is granted and the defendants' motion to dismiss the complaint is denied. Counsel may submit an appropriate order.

This discussion would seem to lead to a final disposition of this litigation insofar as this Court is concerned. This is not possible, however, on the present state of the record, in view of the fact that the plaintiff has made no motion for summary judgment. No doubt this was due to the twenty-day limitation prescribed by Rule 56 of [fol. 64] the Federal Rules of Civil Procedure, since the twenty-day period from the commencement of the action had not expired when the present motions were argued. As this period has now elapsed, the Court would entertain such a motion at this time.

/s/ Alexander Holtzoff
United States District Judge.

January 18, 1962.

[fol. 65] [File endorsement omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER GRANTING PRELIMINARY INJUNCTION AND DENYING DEFENDANTS' MOTION TO DISMISS THE COMPLAINT—Jan. 22, 1962

This cause came on to be heard on December 20, 1961, upon the motion of plaintiff for a preliminary injunction and other relief on the verified complaint, opposed by the defendants and by the intervener, National Maritime Union of America, AFL-CIO, and upon the motion of the defendants to dismiss the complaint. The Court has considered the facts and exhibits as verified under oath in the complaint, the arguments of counsel, and the briefs and memoranda of the parties, including the views of the Department of State submitted by the Department of Justice. Being fully advised in the matter, the Court delivered and filed a written opinion on January 18, 1962. The Court finds that:

In the case before the National Labor Relations Board (hereinafter the Board), described as Case No. 2-RC-10379, re *United Fruit Company and National Maritime Union of America, AFL-CIO*, the decision and direction of election rendered by the Board on November 15, 1961, ordered the conduct of a representation election for collective bargaining purposes, under 29 USC sec. 159(c), [fol. 66] among the Honduran and other foreign seamen, who are employed under contracts executed in Honduras under Honduran law, and who comprise the plaintiff Honduran unions and crews that man the ships registered under the laws and flying the flag of Honduras and owned by the employer the Honduran corporation Empresa Hondurena de Vapores, S.A., which is a subsidiary of the United Fruit Company, an American corporation. The said order for an election exceeds the authority conferred upon the Board by the Labor Management Relations Act of 1947. Since the Board is without power or

authority to issue the order directing the election in this case, it is

ORDERED, ADJUDGED, AND DECREED that, pending further order of the Court, the National Labor Relations Board, its members, officers, agents, employees and successors, and all other persons in active concert and participation with them, be and they hereby are restrained and enjoined from conducting an election for the designation of representatives for collective bargaining purposes among the foreign crewmen comprising the members of plaintiff union, Sociedad Nacional de Marineros de Honduras, who man the Honduran registered ships of Empresa Hondurena de Vapores, S.A.

* * * *

It is further ORDERED, ADJUDGED, AND DECREED, that the security in the amount of $500 filed with the Court on December 16, 1961 shall be continued in effect until the further order of the Court, conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

[fol. 67] And it is further ORDERED, ADJUDGED, AND DECREED, that the motion of the defendants, the National Labor Relations Board, to dismiss the complaint, be and is hereby denied.

s/ Alexander Holtzoff
ALEXANDER HOLTZOFF, Judge

Dated: January 22, 1962

Approved as to form:

/s/ Norton J. Come
Counsel for Defendants
National Labor Relations Board

[fol. 68] [File endorsement omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—
Filed Jan. 23, 1962

The plaintiff, by its attorneys, hereby moves the Court to enter summary judgment for the plaintiff, in accordance with the provisions of Rule 56(a) and (c) of the Rules of Civil Procedure, on the ground that the verified complaint and exhibits annexed thereto, and the pleadings and proceedings heretofore had herein, particularly the opinion of the Court filed January 18, 1962, show that the plaintiff is entitled to judgment as a matter of law.

/s/ Charles S. Rhyne
CHARLES S. RHYNE

/s/ Brice W. Rhyne
BRICE W. RHYNE

/s/ Herzel H. E. Plaine
HERZEL H. E. PLAINE
Rhyne & Rhyne
Attorneys for Plaintiff

January 23, 1962
400 Hill Building
Washington 6, D. C.

[fol. 68a] NOTICE OF MOTION FOR
SUMMARY JUDGMENT—BY PLAINTIFF
(omitted in Printing)

• • • • •

[fol. 68b] CERTIFICATE OF SERVICE
(omitted in Printing)

[fol. 69] [File endorsement omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

CROSS-MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS—
Filed Jan. 31, 1962

The defendant members of the National Labor Relations Board, by their attorney, hereby move the Court, in accordance with Rule 56(b) of the Federal Rules of Civil Procedure, to enter summary judgment for the defendants, on the ground that, based on the verified complaint and exhibits annexed thereto and the record of the proceedings before the National Labor Relations Board in Case No. 2-RC-10379, *United Fruit Company and National Maritime Union of America, AFL-CIO*, a true copy of which is annexed to this motion, defendants are entitled to judgment as a matter of law.

s/ Norton J. Come
NORTON J. COME
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.,
this 31st day of January, 1962.

[fol. 70] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PLAINTIFF'S MOTION TO STRIKE IMPROPER MATERIAL FROM THE RECORD AND FOR CONSOLIDATION OF MOTION WITH PENDING MOTIONS BY PLAINTIFF—Filed Feb. 2, 1962

The plaintiff, by its attorneys, pursuant to Rule 7(b) of the Federal Rules of Civil Procedure, hereby moves the Court to strike from the record of this case the record of the proceedings before the National Labor Relations Board in case No. 2-RC-10379, *United Fruit Company and National Maritime Union of America, AFL-CIO*, which defendants annexed to their cross-motion for summary judgment filed January 31, 1962, on the ground that the testimony and proceedings before the National Labor Relations Board (other than the decision of the Board, copy of which was annexed to plaintiff's complaint) was not before this Court when it considered the case and rendered its opinion of January 18, 1962; that the Court did not, and could not properly, consider the testimony and proceedings before the Board in deciding this case; and that it would be improper for this Court to review the testimony and proceedings before the Board in dealing with the respective motions of plaintiff and defendants for summary judgment and in granting a final judgment.

The plaintiff respectfully requests that the Court con- [fol. 71] sider and dispose of this motion in connection with the disposition of the pending motion of plaintiff

filed January 23, 1962, and cross-motion of defendants filed January 31, 1962, for summary judgment.

Respectfully submitted,

/s/ Charles S. Rhyne
CHARLES S. RHYNE

/s/ Brice W. Rhyne
BRICE W. RHYNE

/s/ Herzel H. E. Plaine
HERZEL H. E. PLAINE
Rhyne & Rhyne
Attorneys for Plaintiff

400 Hill Building
Washington 6, D. C.
February 2, 1962

[fol. 71a] CERTIFICATE OF SERVICE
(omitted in Printing)

[fol. 71b] CERTIFICATE OF SERVICE OF CROSS-MOTION FOR SUMMARY JUDGMENT—
(omitted in Printing)

[fol. 72] [File endorsement omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER TO PLAINTIFF'S MOTION TO STRIKE AND FOR CONSOLIDATION OF MOTION WITH PENDING MOTIONS
Filed Feb. 7, 1962

1. Defendants, members of the National Labor Relations Board, by their attorney, do not object to that portion of plaintiff's motion which requests consolidation of this motion with the motions for summary judgment already filed by plaintiff and defendants with this Court.

2. Defendants oppose that portion of plaintiff's motion which requests that the Court strike from the record of this case the record of the representation proceedings before the Board in Case No. 2-RC-10379, *United Fruit Company and National Maritime Union of America, AFL-CIO*, which defendants annexed to their motion for summary judgment.

In the Board's view, *Lauritzen* v. *Larsen*, 345 U.S. 571, permits it to assert jurisdiction over foreign flag vessels when significant contacts or connecting factors are shown to exist between the vessels and the United States. Based upon evidence taken by the Board in the representation proceeding, the Board concluded that assertion of its jurisdiction was warranted in this case, and, accordingly, directed that an election be held. Upon plaintiff's complaint, seeking review of the Board's action, this Court held that as a matter of law the Board lacks jurisdiction over any vessels flying the flags of foreign nations. Accordingly, this Court did not reach an evaluation of the evidentiary bases upon which the Board predicated its assertion of jurisdiction. However, since the Board relies, [fol. 73] in this and in other cases, upon these contact points in determining whether to assert jurisdiction, the evidence in the record of the representation proceeding, showing the contacts between the vessel and the United

States in this case, may prove significant on appeal from this Court's decision.[1]

Thus, in order to facilitate a complete determination of the legality of the Board's action, we request that the record of the underlying representation proceeding be made a part of the record herein, and that plaintiff's motion to strike be denied.

/s/ Norton J. Come.
NORTON J. COME
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.,
this 6th day of February, 1962.

[fol. 73a] CERTIFICATE OF SERVICE
(omitted in Printing)

[1] See, *West India Fruit and Steamship Co.*, 130 NLRB 343; *Penninsular & Occidental Steamship Co.*, 132 NLRB No. 1; *Eastern Shipping Corp.*, 132 NLRB No. 72; *Hamilton Bros. Inc.*, 133 NLRB No. 85. The Court of Appeals for the Second Circuit relied extensively on these contact points in its decision enjoining the same election as was enjoined by this Court in the instant case. See, *Empresa Hondurena de Vapores, S.A.* v. *McLeod*, January 12, 1962, 49 LRRM 2442.

[fol. 74] [File endorsement omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4020-61

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS,
PLAINTIFF

v.

FRANK W. McCULLOCH, CHAIRMAN, and PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, and GERALD A. BROWN, MEMBERS, NATIONAL LABOR RELATIONS BOARD, DEFENDANTS

ORDER AND JUDGMENT—GRANTING MOTION FOR SUMMARY JUDGMENT, DENYING CROSS-MOTION FOR SUMMARY JUDGMENT, DENYING MOTION TO STRIKE, AND MAKING PRELIMINARY INJUNCTION PERMANENT—
March 6, 1962

1. This cause came on to be heard on March 5, 1962, on a motion for summary judgment by plaintiff filed January 23, 1962, a cross-motion for summary judgment by defendants filed January 31, 1962, and a motion by plaintiff filed February 2, 1962, to strike from the record of this case the record of the proceedings before the National Labor Relations Board.

2. The Court has considered the several motions and the arguments of counsel, and the Court's written opinion of January 18, 1962, which resulted in the order of January 22, 1962, granting plaintiff's motion for a preliminary injunction and denying defendants' motion to dismiss the complaint.

[fol. 75] 3. Accordingly, as a matter of law, the plaintiff is entitled to a summary judgment in its favor, and to an order making permanent the preliminary injunction heretofore issued against the National Labor Relations Board and others therein specified; and defendants' cross-motion for summary judgment should be denied. Plain-

tiff's motion to strike alleged improper material from the record should be denied.

Therefore, it is ORDERED, ADJUDGED AND DECREED that:

A. The motion of plaintiff for a summary judgment in its favor is granted.

B. The cross-motion of defendants for summary judgment in their favor is denied.

C. The motion of plaintiff to strike material from the record is denied.

D. The preliminary injunction, heretofore granted and issued by this Court on January 22, 1962, be and the same hereby is made perpetual and permanent, and the defendants, the National Labor Relations Board, its members, officers, agents, employees and successors, and all other persons in active concert and participation with them, be and they hereby are perpetually and permanently restrained and enjoined from conducting an election for the designation of representatives for collective bargaining purposes among the foreign crewmen comprising the members of plaintiff union, Sociedad Nacional de Marineros de Honduras, who man the Honduran registered ships of Empresa Hondurena de Vapores, S.A.

/s/ Alexander Holtzoff
ALEXANDER HOLTZOFF, Judge

Dated: March 6, 1962

Approved as to form:

/s/ Norton J. Come
Counsel for Defendants
National Labor Relations Board

[fol. 76] [File endorsement omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF APPEAL—Filed March 14, 1962

Notice is hereby given that Frank W. McCulloch, Philip Ray Rodgers, Boyd Leedom, John H. Fanning, and Gerald A. Brown, the Chairman and Members of the National Labor Relations Board, defendants herein, appeal to the Court of Appeals for the District of Columbia Circuit from the order and judgment entered in this action on March 6, 1962, insofar as it grants plaintiff's motion for summary judgment, denies defendants' cross-motion for summary judgment and permanently enjoins the Board from conducting a representation election among the foreign crewmen employed on the Honduran registered ships of Empressa Hondurena de Vapores, S.A.

/s/ Marcel Mallet-Prevost
MARCEL MALLET-PREVOST
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.,
this 13th day of March, 1962.

[fol. 77] [File endorsement omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER GRANTING MOTION BY NATIONAL MARITIME UNION OF AMERICA, AFL-CIO FOR LEAVE TO INTERVENE—March 28, 1962

This case came on to be heard on December 20, 1961 upon the motion of plaintiff for a preliminary injunction and other relief on the verified complaint, and upon the motion of the defendants to dismiss the complaint. Prior to argument of said motions the Court, on oral application of H. Howard Ostrin, Esq., granted the National Maritime Union of America, AFL-CIO leave to intervene in the above-entitled action.

It is therefore on motion of Intervenor

ORDERED that the National Maritime Union of America, AFL-CIO be and if hereby is made a party to the above-entitled action as an intervenor.

Dated: March 28, 1962

/s/ Alexander Holtzoff
ALEXANDER HOLTZOFF, Judge

No objection:

/s/ Marcel Mallet-Prevost
MARCEL MALLET-PREVOST
Attorney for Defendants

/s/ Charles S. Rhyne
Attorney for Plaintiff

[fol. 78] United States Court of Appeals
For the District of Columbia Circuit

Filed April 9, 1962. Joseph W. Stewart, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 4020-61 Civil Action

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, PLAINTIFF

vs.

FRANK W. McCULLOCH, Chairman, NATIONAL LABOR RELATIONS BOARD, ET AL., DEFENDANTS

CERTIFICATION OF RECORD

I, HARRY M. HULL, Clerk of THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, do hereby certify the annexed to be the original pleadings including Exhibits and Reporter's Transcript of Proceedings filed January 5, 1962, and other papers on file in the above entitled cause, and a true and correct copy of the docket entries, as they appear of record in this office; said originals and copy being transmitted to the United States Court of Appeals for the District of Columbia Circuit, to constitute the Record on Appeal.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, this 9th day of April, 1962.

/s/ Harry M. Hull
HARRY M. HULL, Clerk

[fol. 79]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CERTIFICATION TO RECORD

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing papers constitute the original record and exhibits transmitted from the United States District Court for the District of Columbia and filed in said Court of Appeals on April 9, 1962, as the record in the case entitled:

No. 16,965

FRANK W. MCCULLOCH, CHAIRMAN, ET AL., MEMBERS, NATIONAL LABOR RELATIONS BOARD, APPELLANTS

v.

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL., APPELLEES

No. ..... Term, 19....., as the same remain upon the files and records of said Court of Appeals.

[SEAL] IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this sixteenth day of August, A. D. 1962.

JOSEPH W. STEWART
Clerk of the United States Court of Appeals for the District of Columbia Circuit.

By /s/ [illegible]
Deputy Clerk

[fol. 80]

SUPREME COURT OF THE UNITED STATES

• • • •

ORDER ALLOWING CERTIORARI—Filed June 11, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

IVAN C. MCLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EMPRESA HONDURENA DE VAPORES, S.A.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Regional Director of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit, entered on January 12, 1962, reversing an order of the District Court for the Southern District of New York denying a temporary injunction against the holding of a Board representation election on respondent's vessels.

OPINIONS BELOW

Neither the opinion of the court of appeals (App. B, *infra*, pp. 20–49) nor that of the district court (App. B, *infra*, pp. 50–57) is yet reported. The Board's Decision and Direction of Election (App. C., *infra*, pp. 58–70) are reported at 134 NLRB No. 25.

JURISDICTION

The judgment of the court below was entered on January 12, 1962 (App. B, *infra*, pp. 20, 49). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED [1]

Whether the National Labor Relations Act extends to seagoing vessels which—

(1) are beneficially owned by, and operated under control of, an American corporation,

(2) are engaged almost exclusively in regular sailings in foreign commerce between the United States and Latin American ports,

(3) fly the flag of a foreign nation,

(4) carry a foreign crew, and

(5) have substantial and significant contacts with both the United States and the foreign nation.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 29 U.S.C. 151, *et seq.*), and of the other relevant statutes and treaties, are set forth in Appendix A, *infra*, pp. 14–19.

STATEMENT

A. THE BOARD REPRESENTATION PROCEEDING GIVING RISE TO THIS SUIT

On November 13, 1959, the National Maritime Union of America, AFL–CIO ("NMU"), filed a petition with the National Labor Relations Board pursuant to Section 9(c) of the National Labor Relations

[1] See, also, note 14, *infra*, p. 13.

Act seeking certification as the representative of a single fleet-wide unit of all unlicensed seamen employed aboard certain Honduran flag vessels owned by respondent, Empresa Hondurena de Vapores, S.A. ("Empresa"), a Honduran corporation. The petition was filed against United Fruit Company ("UFCO"), an American corporation, of which Empresa is a wholly owned and controlled subsidiary. Sociedad Nacional de Marineros de Honduras ("Sociedad"), a Honduran union which currently represents the employees aboard the vessels, was invited to intervene in the proceedings, but declined to do so or otherwise to participate therein. However, Sindicato Martimo Nacional de Honduras ("Sindicato"), another Honduran union, did intervene and participate. UFCO, together with Empresa (which intervened in the proceedings), contested the Board's jurisdiction on the ground that the Act does not apply to ships flying the flag of a foreign nation (App. C, *infra*, pp. 58–59).[2]

This was one of four cases[3] in which the Board considered the question of its jurisdiction over vessels flying the flags of other nations but operating almost exclusively in commerce between the United States and

[2] The facts set forth herein are based upon the district court complaint (which the Board moved to dismiss, see *infra*, p. 6) and the exhibits attached thereto. Exhibit 1 to the complaint contains the underlying Board decision and Direction of Election, which has been reprinted in Appendix C, *infra*, pp. 58–70.

[3] The other cases were *West India Fruit and Steamship Co., Inc.*, 130 N.L.R.B. 343; *Peninsular and Occidental Steamship Co.*, 132 N.L.R.B. No. 1; *Eastern Shipping Corp.*, 132 N.L.R.B. No. 72.

foreign nations. On February 16, 1961, the Board issued its decision in *West India Fruit and Steamship Company, Inc.*, 130 N.L.R.B. 343, the leading case of the group. It held that, where such a vessel has extensive contacts with this country, its operation affects commerce within the meaning of the Act; and that the Board has jurisdiction to remedy unfair labor practices committed on such vessel.

On November 17, 1961, the Board issued its Decision and Direction of Election in the instant case (App. C, *infra*, pp. 58–70). The Board found that the vessels involved were owned by Empresa, a Honduran corporation; that they were registered under the laws, and flew the flag, of Honduras; that the seamen employed on the vessels were mostly Honduran nationals; and that Empresa hired the officers and crew and handled all matters pertaining to their terms and conditions of employment. The Board further found that Empresa was wholly owned by UFCO, which was an American corporation; that UFCO elects Empresa's directors; and that Empresa, with few exceptions, time charters all of its vessels[4] to UFCO, which, in turn, determines their voyages, ports of call, length of stay in various ports, and cargoes. Finally, the Board found that the vessels operate between Central and South American countries and the United States, carrying UFCO cargo on inbound and outbound voyages; that they regularly call at United States ports; and that Empresa vessels

[4] Under a "time" charter, the charterer provides not only the vessel, but also all officers and crewmen. This is to be distinguished from a "bareboat" charter, which covers only the vessel.

were used interchangeably by UFCO with other vessels—some under the American flag and some under foreign flags other than Honduran—which it owned and controlled, the vessels being assigned on the basis of availability, size and speed. (App. C, *infra*, pp. 62–66.)

The Board concluded that "Empresa's maritime operations are a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation * * *." The Board also held that "Empresa through its immediate authority and control over hiring and other terms and conditions of employment and UFCO through its control of Empresa and of the vessels and their operations are joint employers of the employees covered by the petition." The Board further ruled that the maritime operations involved "possess those substantial United States contacts which, under our decision in *West India*, bring them within the jurisdictional coverage of the Act, despite the foreign registry of the vessels, Empresa's foreign incorporation, and other foreign aspects present;" and that "Empresa and UFCO and their maritime operations subject of the petition are in, and affect, commerce within the meaning of Sections 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding." (App. C, *infra*, pp. 66–68.)

The Board ordered that an election be conducted among the employees of the UFCO-Empresa vessels

to determine whether they wished to be represented by the NMU, by Sindicato, or by no union (App. C, *infra*, pp. 69–70). Pursuant to the Board's direction, the Regional Director of the Second Region ordered that the election commence on December 17, 1961 (App. B, *infra*, p. 23).[5]

B. THE PRESENT SUIT

On December 12, 1961, respondent Empresa filed this suit against the Board's Regional Director, in the District Court for the Southern District of New York, to enjoin the scheduled election.[5a] Empresa alleged that the Board's assertion of jurisdiction over the vessels violated its constitutional rights, principles of international law, and Article 10 of the Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927. In opposition to Empresa's motion for a temporary injunction, the Regional Director moved to dismiss the complaint, on the grounds that the district court lacked jurisdiction over an employer's suit to enjoin a representation election, that the request for relief was premature, that the members of the Board were indispensable parties defendant, and that, in any event, the Board's action was proper (App. B, *infra*, p. 23). On December 16, 1961, the district court (Judge Palmieri), after hearing, denied a temporary injunction. The court held that, although the alle-

[5] On those vessels arriving in ports of the United States between that date and January 31, 1962, the election was to be conducted in port. On vessels not scheduled to arrive during that period, the election was to be conducted by mail. (App. B, *infra*, p. 51.)

[5a] The National Maritime Union intervened in the suit as a party defendant.

gation that the treaty had been violated raised a sufficiently substantial constitutional question to give it jurisdiction to review the Board's Direction of Election, under *Vay* v. *Douds*, 172 F. 2d 720 (C.A. 2),[6] the mere holding of the election, pending a final determination of the legal issue, would not result in irreparable damage to Empresa (App. B, *infra*, pp. 50–57).

On January 12, 1962, the court of appeals reversed, and ruled that a temporary injunction should issue.[7] It held that, although the words of Sections 2(6), 2(7) and 9(c) of the Act literally cover this case,[8] the words should not be "stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage" (App. B, *infra*, p. 37). The court quoted (App. B, *infra*, p. 38) this Court's statements in *Lauritzen* v. *Larsen*, 345 U.S. 571, 584–585, that under maritime law the law of the flag is of "cardinal importance," and that

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[6] In that case, the Second Circuit (per Learned Hand, J.) had held that, although the district court generally was without jurisdiction to review Board action in a representation proceeding at the suit of an aggrieved union, an exception existed where a substantial constitutional question was presented. See also, *Leedom* v. *Kyne*, 358 U.S. 184, extending that principle to a situation where the Board action violates a plain statutory requirement.

[7] On December 20, 1961, after the argument of the appeal, the court stayed the election pending its decision.

[8] Section 9(c) directs the Board upon finding, after a hearing upon a petition, "that a question of representation affecting commerce exists," to direct an election by secret ballot and to certify the result thereof. "Commerce" is defined by Section 2(6) to include trade "between any foreign country and any State"; affecting commerce" is defined in Section 2(7) as meaning "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

the weight to be given the flag "overbears most other connecting events in determining applicable law." The court stated (*ibid.*) that "[h]ow 'cardinal' the importance is and how much 'weight' should be given must depend, in the absence of clear expression by Congress, on what other factors of foreign and United States interest are present, and on the nature of the United States statute sought to be applied * * *."

The court concluded that the National Labor Relations Act does not apply to the vessels involved in this case.[9] It stated (App. B, *infra*, p. 43) that to apply the Act "would involve the risk of continuous conflict between the United States and Honduras with respect to labor conditions which * * * are still Honduras' 'primary concern' "; and that Empresa's case "goes far beyond the flying of the Honduran flag, important as *Lauritzen* teaches that to be. In this case there are also the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels' regular visits to Honduras, the Honduran corporate identity—admittedly not fictitious—of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters. Though the vessels are engaged in the foreign commerce of the United States, they are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Hon-

[9] The court stated (App. B, *infra*, pp. 48–49) that, "[i]n order to avoid any possible misunderstanding in this controversial area, we emphasize that we are deciding only the case before us; what the result should be when the contacts of the country of the flag are weaker relative to those of the United States than here, we do not say."

duran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed, for the purpose here at issue, by Honduras' interests."

REASONS FOR GRANTING THE WRIT

1. This case presents the same basic issue which is involved in *Incres Steamship Company, Ltd.* v. *International Maritime Workers Union*, No. 469, this Term, certiorari granted, December 4, 1961, 368 U.S. 924, *i.e.*, whether, and to what extent, the National Labor Relations Act may be applied to vessels flying foreign flags which are substantially engaged in the commerce of this nation.[10] In *Incres*, the Court of Appeals for New York held that the Act "arguably" applied to a labor dispute arising out of an attempt by an American union to organize the crews of two vessels owned by Italian interests and flying the flag of Liberia, but operating as cruise ships for American tourists between New York and the Caribbean; and that the State courts therefore had no jurisdiction to enjoin the union's picketing of such vessels. 10 N.Y. 2d 218, 176 N.E. 2d 719. In so holding, the New York court relied on the *West India* and related cases (note 3, *supra*, p. 3) in which the Board had taken jurisdiction over foreign flag ships—the same cases which formed the basis for the Board's exercise of jurisdiction in the present case.

[10] In *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, the Court held that the Act did not apply to a vessel, owned by a foreign corporation, sailing under a foreign flag, and manned by a foreign crew. But there, unlike here and in *Incres*, the vessel's only contact with the United States was that it "happened temporarily to be in American waters." See *Marine Cooks* v. *Panama S.S. Co.*, 362 U.S. 365, 369.

Although the court below stated that it was deciding only the particular case before it (see note 9, *supra*, p. 8), its holding that the various contacts between Empresa and the United States were not sufficient to give the Board jurisdiction casts doubt upon those earlier Board decisions and, consequently, upon the New York Court of Appeals decision in *Incres*. And in at least one respect the foreign flag ships involved in the present case have more substantial ties with the United States than the vessels involved in *Incres*. For in the latter case, the vessels are owned by Italian interests, whereas in the present case the vessels, although owned by a Honduran corporation, are operated as part of the business of that company's American parent, UFCO.

The Board decides whether it has jurisdiction over foreign flag vessels operating in the commerce of the United States on the basis of the contacts which the particular vessels have with the United States. In determining the scope of the Board's jurisdiction in this area, the Court should find it helpful to have before it some of the other factual contexts in which the issue has arisen. It is therefore appropriate for the Court to grant the petition in this case, and to set the case for hearing together with *Incres*.[11]

[11] While the present suit by Empresa was pending, another suit to enjoin the same election was brought in the District Court for the District of Columbia by Sociedad, the Honduran union which currently represents the seamen on the vessels. On January 18, 1962, the District Court for the District of Columbia likewise held that the election should be enjoined, on the broad ground that the Board lacks power to apply the Act to vessels flying the flags of other nations. *Sociedad Nacional* v. *McCulloch, et al.*, Civil Action 4020–61 (D.D.C.), 49 LRRM 2434. On March 6, 1962, a final judgment was entered

2. Prompt and definitive guidance upon the applicability of the National Labor Relations Act to employment upon foreign flag vessels is a matter of great urgency to the Executive Branch of the government as well as to the National Labor Relations Board.

The question presented is an important and recurring problem in the administration of the Act.[11] Employment conditions upon foreign flag vessels have been a matter of vital concern to maritime unions in the United States because of their competitive effect,[12] and this problem, coupled with union activities upon foreign flag vessels, has given rise to considerable unrest in maritime labor relations. Uncertainty concerning the governing jurisdictional principles is one contributing factor.

The Board's holding that the Act applies to these Honduran vessels is of grave concern to the Department of State because it raises delicate questions concerning

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in that case, and the Board thereafter noted an appeal to the United States Court of Appeals for the District of Columbia. As soon as the record is docketed in that court, the Board intends to file a petition for certiorari in advance of judgment by the court of appeals.

[12] In addition to the instant case, the Board has taken jurisdiction in five other cases involving foreign flag ships. *West India Fruit and Steamship Co.*, 130 NLRB 343, an unfair labor practice case, pending on the company's petition to review, in the Fifth Circuit; *Peninsular and Occidental S.S. Co.*, 132 N.L.R.B. No. 1, also an unfair labor practice case, pending on the Board's petition for enforcement, in the Fifth Circuit; *Eastern Shipping Corp.*, 132 NLRB No. 72, *Hamilton Bros., Inc.*, 133 NLRB No. 85, and *Owens-Illinois Glass Company*, 136 NLRB No. 32, all representation cases. See also, *Navios Corp.* v. *National Maritime Union*, 402 Pa. 325, 166 A. 2d 625, certiorari denied, 366 U.S. 905.

[11] Employment on American flag ships has steadily declined since 1945. See *The Flag-of-Convenience Fleet*, 69 Yale L.J. 498, 502–503 (1960).

our obligations under treaties and other problems in foreign relations, some of which have already been the subject of representations by the Honduran government.

The Department of Defense deems the availability of the fleet of foreign flag vessels in the case of war or national emergency to be essential to the national defense; as a practical matter the ownership and status of these ships are likely to be affected not only by the resolution of the ultimate issue but, quite possibly, by continued uncertainty.

As long as the basic question is in debate the interested parties, both governmental and private, will find it difficult, and often impossible, to formulate long-range plans and programs vitally affecting maritime labor relations, international relations and the national defense. In these circumstances a definitive determination by this Court of the scope of the Board's jurisdiction over foreign flag carriers operating in foreign commerce between the United States and other nations is urgently required.

CONCLUSION

The Solicitor General is not presently able to advise the Court of the position of the United States upon the merits. The United States will formulate its position before argument on the merits and also expects to file a brief *amicus curiae* in the *Incres* case. The National Labor Relations Board believes that it properly asserted jurisdiction in the present case and that the decision below should be reversed. The Solicitor General on behalf of the United States unqualifiedly joins in the representations concerning the importance of the case and the need for a decision by this Court.

The petition for a writ of certiorari should be granted and the case should be set down for argument together with the *Incres Steamship Company, Ltd.*, v. *International Maritime Workers Union*, No. 469, this Term, certiorari granted, 368 U.S. 924.[14]

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

APRIL 1962.

[14] While we disagree with the holding of the court of appeals (App. B, *infra*, pp. 29–34) that the district court had jurisdiction, at the suit of an employer, to enjoin the Board from conducting an election, we do not believe that this Court will have to reach the question. As noted (note 11, *supra*, p. 10), the District Court for the District of Columbia, in a suit brought by a union, has recently enjoined the Board from conducting the same election. The Board intends to file a petition for a writ of certiorari before judgment by the court of appeals in that case. The Board does not contest the right of a union (as distinguished from an employer), in the very peculiar circumstances here involved, to maintain an action in the district court challenging a Board of a representation proceeding. If this Court grants the petition to be filed in the District of Columbia case, it can there decide all the substantive issues raised in the present petition, without having to reach the jurisdictional question, and its decision there will settle the basic controversy in the case. We refer to the jurisdictional issue primarily to reserve the right to argue it if the Court should deny the petition in the District of Columbia case.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 946, 29 U.S.C. 151, *et seq.*) are as follows:

SECTION 1. * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute bur-

dening or obstructing commerce or the free flow of commerce.

* * * * * *

SEC. 9 * * *

* * * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

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(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

* * * * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

SEC. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts busi-

ness, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in

part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact in supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618:

ARTICLE 10:

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on

the high seas, be deemed to be the vessels of the Party whose flag is flown.

* * * * *

ARTICLE 22:

A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

* * * * *

U.S. Code—Title 28:

SECTION 1331. *Federal question; Amount in controversy; costs.*

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

* * * * *

SECTION 1337. *Commerce and anti-trust regulations.*

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

APPENDIX B

United States Court of Appeals for the Second Circuit

No. 233—September Term, 1961

Argued December 20, 1961—Decided January 12, 1962

Docket No. 27314

EMPRESA HONDURENA DE VAPORES, S.A. PLAINTIFF-APPELLANT

v.

*IVAN C. MCLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD, DEFENDANT-APPELLEE

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, INTERVENOR-APPELLEE

Before LUMBARD, *Chief Judge,* FRIENDLY and MARSHALL, *Circuit Judges.*

Plaintiff appeals from an order of the District Court for the Southern District of New York, Edmund L. Palmieri, *Judge,* denying a motion to enjoin defendant, Regional Director of the National Labor Relations Board, *pendente lite* from conducting a representation election on plaintiff's Honduran registered vessels. **Reversed.**

ORISON S. MARDEN, (*White & Case*), *New York, New York (Chester Bordeau and William D. Conwell, of Counsel), for Plaintiff-Appellant.*

*2-RC-10379.

ALLEN I. MENDELSOHN,
(Stuart Rothman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington, D.C., and Samuel M. Kaynard, Regional Attorney, New York, New York), for Defendant-Appellee.

HERMAN E. COOPER,
New York, New York, for Intervenor-Appellee.

ALFRED A. CIARDINO,
New York, New York, for United Fruit Company.

FRIENDLY, *Circuit Judge:*

The complaint of Empresa Hondurena de Vapores, S.A., hereafter Empresa, against the Regional Director of the National Labor Relations Board, filed in the District Court for the Southern District of New York on December 12, 1961, made allegations which we summarize as follows:

(1) Empresa is a Honduran corporation, organized in 1941, with its principal office and place of business in Puerto Cortes, Honduras. It operates thirteen seagoing vessels, ten of which it owns and three of which are owned by Balboa Shipping Company, Inc., a Panamanian corporation, which, like plaintiff, is a wholly owned subsidiary of United Fruit Company, a New Jersey corporation. All the vessels are registered under the laws of Honduras and fly the Honduran flag.

(2) The vessels are manned by unlicensed seamen, some 335 in number, all but one of whom are citizens of Honduras (the one being a British subject), employed in Honduras under Shipping Articles executed there. The vessels, all of which are time-chartered to United Fruit, ply between ports in Central and

South America, the United States, Canada and Europe; all of them call regularly at Honduran ports for trade and renewal of Ship's Articles. Since 1941 the seamen have been represented by Sociedad Nacional de Marineros de Honduras, a Honduran labor union recognized by the Republic of Honduras, hereafter Marineros, as their collective bargaining agent. A collective bargaining agreement between Empresa and Marineros was made in 1957, to remain effective until April 15, 1959, and thereafter to be automatically renewed for successive two year terms in the absence of contrary notice; it now stands renewed until February 15, 1963. Honduras "has a long established and comprehensive system of laws and regulations governing all aspects of the ownership and operation of vessels registered in Honduras and the employment of personnel thereon"; under that law plaintiff is required to recognize Marineros as the exclusive bargaining agent of its unlicensed seamen, and labor grievances are handled by representatives of plaintiff and Marineros subject to the Ministry of Labor and the Labor Courts of Honduras.

(3) On November 15, 1961, the NLRB rendered a Decision and Direction of Election, 134 NLRB No. 25, which, as later modified, instructed the defendant Regional Director to conduct an election among plaintiff's seamen to determine whether they desired to be represented for collective bargaining purposes by National Maritime Union, AFL–CIO, by Sindicato Maritimo Nacional de Honduras ("Sindimar"), or by neither.[1] The Honduran Labor Code prohibits the exercise of functions by a union "so long as it does not have recognition of its juridic personality" or if its personnel is not at least 90% Honduran;

[1] The Board's decision states that Marineros was notified the Board would grant it a right to intervene but did not reply.

National Maritime Union fails on both counts. Defendant has informed plaintiff that the election is to take place, beginning December 17, 1961, on board vessels arriving in United States ports between December 17, 1961 and January 31, 1962, and by mailing ballots to employees on vessels not so scheduled.

Alleging that the Board's direction violated Article 10 of the Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618,[2] as well as the Constitution of the United States and the principles of international law, plaintiff sought temporary and permanent injunctive relief. By order to show cause signed December 12, 1961, on an affidavit of counsel incorporating the allegations of the complaint, the motion for a temporary injunction was brought on for hearing before Judge Palmieri on December 14. The Regional Director moved to dismiss. He asserted that the District Court lacked jurisdiction over a direction for an election, that the request for relief was premature, that the members of the NLRB were indispensable parties defendant, and that in any event the Board's action was proper.

Relevant to the last contention are certain additional facts stated in the Board's opinion and not challenged before us: United Fruit Company is predominantly United States owned. The bulk of its trade is between Central and South American countries which grow bananas and other tropical produce.

[2] This states:

"Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of other High Contracting Party and on the high seas, be deemed to be the vessel of the Party whose flag is flown."

and the United States. Empresa's officers are elected by its directors who are elected by United Fruit, and Empresa has always time-chartered all its vessels, almost entirely to United Fruit. However, Empresa "appears to function as a distinct corporate entity," and "There is nothing in the record to suggest that Empresa does not in fact carry out * * * typical responsibilities of the owner of a vessel under a time charter," including "hiring the officers and crews and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel."[3] On the other hand, United Fruit determines the routing of Empresa's ships, communicating its desires and complaints to the captain or to some other officer of Empresa. The vessels regularly call at United States ports, carrying United Fruit cargo on inbound and outbound voyages and also general cargo on the latter; some of the ships also carry passengers. Empresa's vessels are used by United Fruit in the same manner as other chartered or owned vessels registered under United States law.

It should be observed also that the Attorney General, acting at the request of the Departments of State and Defense, was permitted to appear as *amicus curiae* before the Board in this and related cases. Although the Attorney General's brief to the Board stated that it was not its "purpose * * * to support or oppose the position of the steamship companies or the position of the unions" (p. 2), it advanced (pp. 15–20) a list of proposed "principles to be applied in determining whether a vessel and its crew shall be deemed foreign and thus beyond the scope of the

[3] In view of these and other specific findings of fact we consider the Board's statement that United Fruit is a "joint employer" to be an erroneous legal conclusion, which must be disregarded.

Act," and "submitted * * * that the flag, as a ready, recognizable, and accepted standard must be preferred pragmatically to any other and that in accordance with that standard, the indirect financial interest of American citizens in a foreign registered ship may not deprive a vessel of its status as a national of the country whose flag is flown."

Despite the time pressure created by plaintiff's failure to bring this action until almost the eve of the scheduled election, Judge Palmieri prepared a thoughtful opinion, filed on December 16. Holding that the District Court had jurisdiction of the subject matter since, as he believed, plaintiff had made a colorable allegation of denial of constitutional rights, see *Fay* v. *Douds*, 172 F. 2d 720, 723 (2 Cir. 1949), he nevertheless denied the injunction since he was not convinced of the probability of plaintiff's success or by its claims of irreparable damage from the election. He therefore deemed it unnecessary to decide at that time whether the members of the Board were indispensable parties.

Although a motion for a stay pending appeal was initially denied, the appeal itself was argued on December 20. Meanwhile the election had been stayed as the result of a temporary restraining order issued by the District Court for the District of Columbia in an action by Marineros against the members of the Board. The argument having convinced us that the case presented serious issues involving the relations of the United States with a foreign government and that no irreparable damage would be caused by a brief delay of the election, we then issued a stay pending determination of the appeal. We have reached a conclusion different from that of the District Judge.

Two other circumstances must be mentioned before we proceed further: Under date of December 15, 1961,

the Department of State, through its Legal Adviser, forwarded to Judge Palmieri, without comment, a note dated November 29, 1961, from the Ambassador of Honduras, protesting against the Board's decision, which was claimed to violate Articles 10 and 22 of the Treaty of Friendship, Commerce and Consular Rights,[4] to involve an intrusion by the United States into an area exclusively occupied by Honduras, and to infringe established principles of international law; the communication did not reach Judge Palmieri until December 18, after his decision had been filed. On January 10, 1962, the Department of Justice submitted to the District Court for the District of Columbia a letter saying that although the Department of State "does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case."

I. THE JURISDICTION OF THE DISTRICT COURT

(1) Although the issue has not been raised, we must first consider whether the complaint, invoking 28 U.S.C. §§ 1331 and 1337, set forth a claim cognizable by a Federal district court, *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934).

As subsequent discussion will show, the complaint advanced a claim arising under a treaty sufficient to

[4] Article 22 provides that "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit."

come within § 1331, whether or not the claim was meritorious; the difficulty with respect to § 1331 is jurisdictional amount. When a plaintiff asserts the right to be free from regulation, "The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed." *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 181 (1936). Here the complaint alleged that "the matter in controversy exceeds the value of $10,000, exclusive of interest and costs," but no facts were pleaded to substantiate this, and it is not obvious that an election alone would cause damage in that amount. Hence, if the allegation had been put in issue, as it was in the *McNutt* case and in *KVOS, Inc.* v. *Associated Press*, 299 U.S. 269 (1936), and plaintiff had not supported it, Federal jurisdiction under § 1331 could not be sustained. However, no such traverse was made and the allegation was not so clearly baseless that the court was bound to disregard it even in the absence of challenge, although the court "might, of its own motion, have entered upon an inquiry to ascertain whether the cause was one over which it had jurisdiction," *KVOS, Inc.* v. *Associated Press, supra*, at 277.

Moreover, we think the complaint asserted a claim under § 1337, giving district courts jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce * * *," without regard to the amount in controversy. The National Labor Relations Act is such an Act, *American Federation of Labor* v. *Watson*, 327 U.S. 582 (1946); *Capital Service, Inc.* v. *NLRB*, 347 U.S. 501 (1954); the question is whether the action here is one "arising under" it. In support of a negative answer it could be said that what plaintiff is asserting is a right to be free from the Act, not a right allegedly conferred by it.

But § 1337, like § 1331, speaks not of a claim created by, but of an action arising under, an act regulating commerce; it would run counter both to the language and to the policy underlying the statute to hold that the jurisdictional grant did not include an action whose sole purpose is to challenge an order of a Federal agency sought to be justified by a Federal statute. Whatever might earlier have been thought because of language in *American Well Works Co.* v. *Lane & Bowler Co.*, 241 U.S. 257, 260 (1916), the later decision in *Smith* v. *Kansas City Title & Trust Co.*, 253 U.S. 180 (1921), seems to have crossed that bridge, see *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 450 (1955); cases such as *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908), are distinguishable in that the action was to enforce a claim arising under state law, there a right under a contract, with the Federal statute a matter of defense, see also *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950), whereas here, as in *Smith*, it is the proposed application of the Federal statute alone that gives rise to the action. We do not pretend the distinction to be altogether clear or satisfying; but if one line of cases or the other has to be favored, considerations of good sense support those permitting the sphere of application of Federal statutes to be determined by Federal courts.[5]

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[5] Professor Mishkin believes it now to be settled "that an action for a judgment declaring the non-existence of such a federally created right in the other party also falls within the federal question statute." The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 179 (1953).

We have not overlooked that the action here is against a Federal officer—a circumstance which one feels ought make a difference but apparently, under existing statutes, doesn't. Simply as a matter of language it might be argued that if

(2) The next problem as to the jurisdiction of the District Court is presented by the first two grounds of defendant's motion to dismiss, best considered together, namely, that the court has no power to enjoin an order for an election, especially at the suit of the employer, and that plaintiff's resort to the courts is premature.

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jurisdiction under 28 U.S.C. § 1331 fails for lack of the required amount, the action would come within 28 U.S.C. § 1346 (a)(2) giving the district courts jurisdiction over "Any other civil action or claim against the United States not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department * * *" But, apart from the inconsistency that one contention would assert the suit to be against the United States whereas the other would deny it, and the question whether § 1346(a)(2), the successor of the Tucker Act, 24 Stat. 505 (1887), authorizes an injunction, see *United States* v. *Jones*, 131 U.S. 1 (1889); cf. *Hatahley* v. *United States*, 351 U.S. 173, 182 (1956), the argument would fail on the basis that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). An authority on the subject says, with respect to such suits against federal officers, that "Apart from situations where a method of judicial review is particularly prescribed by statute, the only grant of jurisdiction that includes such cases is that in matters arising under the Constitution or the laws. This mode of treatment includes limitations, such as jurisdictional amount and the rule that federal questions must appear without anticipation of defenses, that have no place in actions against federal officials, which are necessarily of federal concern." Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemporary Problems 216, 220 (1948). *Deering Milliken, Inc.* v. *Johnston*, —— F. 2d ——, —— (4 Cir. 1961), might suggest that § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e), could serve here as a special statutory provision such as Professor Wechsler mentions, but that would require us to decide whether the NLRB's direction of election constituted "final agency action" within the meaning of that Act.

In *Local 1545, United Brotherhood of Carpenters* v. *Vincent*, 286 F. 2d 127 (2 Cir. 1960), we stated that District Court jurisdiction to enjoin Board directions in representation matters had been recognized in two types of cases, namely, (i) where plaintiff made an assertion, "not transparently frivolous," that failure to enjoin would deny rights guaranteed by the Constitution, *Fay* v. *Douds*, 172 F. 2d 720, 723 (2 Cir. 1949), and (ii) where the Board had acted in plain contravention of a specific mandate of the Act, *Leedom* v. *Kyne*, 249 F. 2d 490 (D.C. Cir. 1957), aff'd 358 U.S. 184 (1958). The instant case does not come within the second exception; although we conclude that the Board erred, its error was far from "plain," *International Assn. of Tool Craftsmen* v. *Leedom*, 276 F. 2d 514, 516 (D.C. Cir. 1960). Neither, with all respect to the learned District Judge, do we think it came within the first. Assuming as we do that the claim that the Board's action violated Article 10 of the 1927 Treaty with Honduras, see fn. 2, was "not transparently frivolous," a claim that such action violated any constitutional rights of plaintiff would be. For, apart from the uncertainty how far a treaty confers rights upon nationals of the foreign state as distinguished from the state itself, see American Law Institute, Restatement of the Foreign Relations Law of the United States, Tent. Draft No. 5, §§ 109 and 110; cf. *Asakura* v. *Seattle*, 265 U.S. 332 (1924) and 28 U.S.C. § 1350, the Constitution does not prohibit Congress from legislating in violation of a treaty, *The Cherokee Tobacco*, 11 Wall. 616 (1870); *Head Money Cases*, 112 U.S. 580, 597–600 (1884), or directing its delegate to that end. On the other hand, the courts will not assume such a purpose on the part of Congress unless "clearly expressed," *Cook* v. *United States*, 288 U.S. 102, 119–120 (1933); *Whitney*

v. *Robertson*, 124 U.S. 190, 194 (1888)—for one reason because such a violation would involve the United States in a claim for breach of its international obligation, Restatement of the Foreign Relations Law of the United States, Tent. Draft No. 3, § 128. Any benefit plaintiff takes from the Treaty thus goes to statutory interpretation, not to constitutional right.

However, the failure of the complaint to come within either of the categories of actions to enjoin representation orders that have heretofore been sustained is not fatal; the book has not been closed for all time. *Leedom* v. *Kyne*, *supra*, must be taken to have determined that, whatever may be the case with respect to orders of the National Mediation Board as to bargaining units, see *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943); *UNA Chapter, Flight Engineers International Assn.* v. *National Mediation Board*, 294 F. 2d 905 (D.C. Cir. 1961), cert. denied, —— U.S. —— (1962), representation orders of the NLRB have not been vested with complete immunity from injunction, either by inferences from the National Labor Relations Act or on the principle of *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41 (1938). Once that step has been taken, the courts must make up their minds, as best they can, whether in a particular type of case Congress would or would not have wished them to intervene against "agency action taken in excess of delegated powers," 358 U.S. at 190. The considerations as to delay from judicial intervention, persuasively marshalled in Mr. Justice Brennan's dissent for Mr. Justice Frankfurter and himself in *Leedom* v. *Kyne*, *supra*, at 191–196, argue for a negative answer in the usual case, having purely domestic significance, where the Board is alleged to have acted wrongly, although not plainly so; hence we gave such

an answer in the *Local 1545* case and in *McLeod* v. *Local 476*, 288 F. 2d 198 (2 Cir. 1961), as the Court of Appeals for the District of Columbia has done in numerous cases cited in the *Local 1545* opinion.[6] An altogether different situation is presented when, as here, there is a substantial claim that the Board is exceeding its jurisdiction in the field of foreign relations and is thereby offending a friendly foreign government; we cannot believe Congress would have wished to limit the role of the courts in that situation to cases where the Board had violated a "clear statutory command," *Leedom* v. *Norwich, Connecticut Printing Specialties and Paper Products Union*, 275 F. 2d 628 (D.C. Cir.), cert. denied, 362 U.S. 969 (1960), as against a command not so clear. Not only is the case in favor of judicial action stronger than in the typical domestic representation dispute, but the practical objections against it are weaker. Here the Board is entering a new and sensitive area of activity; while we do not assert that its jurisdiction with respect to foreign flag ships is to be decided on an all or nothing basis, the significant variations among the fact patterns are sufficiently few that guidelines ought soon be pricked out by the courts[7]—failing the more desirable solution of new legislation—and the problem will thus not be a constantly recurring one.

[6] We take it that the point of the "plain contravention" requirement is to close the doors of the courts at the very outset to actions for injunctions in representation matters, which, though ultimately found unmeritorious, would have accomplished much of their objective by the very time required for judicial consideration. An inevitable corollary of the requirement is that a court must sometimes refuse to entertain a complaint asserting what it regards as a valid claim.

[7] The Supreme Court has already granted certiorari, —— U.S. —— (1961), in a case involving one rather typical pattern, *Incres Steamship Co., Ltd.* v. *International Maritime Workers Union*, 10 N.Y. 2d 218, 219 N.Y.S. 2d 21 (1961).

Assuming that the principle of *Leedom v. Kyne* may be thus extended in a proper case, two further problems must be faced. One is that here the suit is by the employer who, arguably, is sufficiently protected by the possibility of sitting out the election and certification, continuing to recognize the existing union, awaiting the filing of an unfair labor practice charge for so doing, and, when held for this, bringing the direction of election before a court of appeals, as provided in § 9(d) of the Act, on enforcement or review proceedings under § 10(f). The second is that, unlike *Leedom v. Kyne*, the instant action was brought to enjoin an election rather than a certification. See Cox, The Major Labor Decisions of the Supreme Court, October Term 1958, reprinted in Gellhorn and Byse, Administrative Law: Cases and Comments (1960 ed.), 441, 447–448.

An answer to the first point may be that, as shown in 73 Harv. L. Rev. 84, 219–220 (1959), the possibility of the plaintiff's precipitating an unfair practice charge was present in *Leedom v. Kyne* itself; yet the Court evidently did not deem this fatal. An answer to the second, in the circumstances here, is that, with Marineros not on the ballot, the situation was not one, such as in *Local 1545*, where a victory by particular union at the polls might eliminate any need for resorting to the courts; here, whether the winner was NMU, Sindimar, or "no-union," plaintiff would suffer by being obliged to breach its contract with Marineros and, on the allegations of its complaint, to violate Honduran law by doing so. Sufficient though these answers may be, a more generally satisfying one is again the distinction between a case with international aspects and one without. If action ordered by the Board would trench on the jurisdiction of a foreign government contrary to the will of Congress, the

best time to stop it is before the offense occurs, not somewhere along the line.

(3) The final problem as to the power of the District Court to entertain the action arises from the contention of the Regional Director* that the action must be dismissed since the members of the Labor Board were indispensable parties-defendant but were not named as such and could not have been served with process in the Southern District of New York and would have had a valid venue objection, 28 U.S.C. § 1391(b), if they had been.

So far as we have been able to determine, this precise question has not been squarely decided by any court of appeals. It has provoked differences of opinion in the district courts. In *American Communications Ass'n* v. *Schauffler*, 80 F. Supp. 400 (E. D. Pa. 1948), a three-judge court with one judge dissenting, and in *White* v. *Donds*, 80 F. Supp. 402 (S.D. N.Y. 1948), Chief Judge Ryan, held that the Board members were essential parties-defendant. In *Local 1545, United Brotherhood of Carpenters* v. *Vincent*, 187 F. Supp. 921 (S.D. N.Y. 1960), Judge Dimock took a contrary view, citing *Williams* v. *Fanning*, 332 U.S. 490 (1947); in affirming his dismissal of the complaint on other grounds, we expressly did not pass upon that issue, 286 F. 2d at 129. *Deering Milliken, Inc.* v. *Johnston*, —— F. 2d —— (4 Cir. 1961), lends support to Judge Dimock's position, although it involved the conduct of a hearing rather than of an election directed by the Board.

Williams v. *Fanning*, *supra*, upheld a suit to enjoin a postmaster from carrying out a fraud order

* The Board's order of November 15 provided: "The Regional Director * * * shall direct and supervise the election": the supplemental order of December 5 provided "for the conduct of the election at the discretion of the Regional Director."

of the Postmaster General. The rule there stated, 332 U.S. at 493–494, is that "the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising a power lodged in him or by having a subordinate exercise it for him" but not "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court"; it is immaterial, in the latter event, that the subordinate "would be left under a command of his superior to do what the court has forbidden." This would seem to carry the day for plaintiff save for defendant's contention that the the Board is not required to have an election conducted by the regional director, citing § 102.69 of its Rules and Regulations—the implication being, we suppose, that a decree against the regional director would not "effectively" grant relief since the Board could circumvent the decree by ordering someone else to conduct the election. We need not consider whether a response that the Board could not do any such thing, since the decree would be *res adjudicata*, would be circular reasoning or not, see 3 Davis, Administrative Law Treatise (1958), pp. 602–603. For the Supreme Court, when confronted with an essentially similar contention with respect to the need for joining the Commissioner of Immigration and the Attorney General with the District Director in the review of a deportation order, deemed it enough to say, "But we need not decide the effect of such a judgment. We cannot assume that a decision on the merits in a court of appeals on a question of this kind, subject to review by this Court, would be lightly disregarded by the immigration authorities." *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 53 (1955). Significant also, and quite applicable here, is the

Court's statement in that case, "Undoubtedly the Government's defense can be adequately presented by the District Director who is under the supervision of the Commissioner."[9] We hold the members were not necessary parties.

M. THE POWER OF THE BOARD TO DIRECT AN ELECTION

Although the appeal is from denial of a temporary injunction, there appears to be no real dispute on factual matters. The case came before the District Judge on plaintiff's application for an injunction and the Board's motion to dismiss the complaint; hence we shall assume for the purposes of this opinion that the facts are as stated above, although the parties will be free to challenge them at a trial on final relief. The issue being one of law, the standard is whether we think the District Judge was wrong, not whether he was "clearly" so, *Carroll v. Associated Musicians*, 295 F. 2d 484, 488–489 (2 Cir. 1961), and cases cited.

The defendant's position proceeds from the basis that § 9(c) of the Act authorizes direction of an election if the Board has determined that "a question of representation affecting commerce exists"; that "affecting commerce" is defined by § 2(7) to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce"; and that § 2(6) defines commerce to include "trade, traffic, commerce, transportation or communication * * * between any foreign country and any State, Territory, or the

[9] See Notes, William v. Fanning Revisited: The Indispensable Superior in Judicial Review of Administrative Actions, 54 Colum. L. Rev. 1128 (1954); The Doctrine of Indispensable Parties as Applied in Review of Administrative Action, 103 U. of Pa. L. Rev. 238 (1954).

District of Columbia." Literally the words cover the case. Yet the Board would hardly insist that the words apply to everything within their literal reach: we have not heard it suggested that the Board considers its power extend to the stevedores who load Empresa's ships in Honduras although they are engaged in "commerce" quite as much as the seamen who man them. Neither do we suppose the Board would think it could direct an election among miners employed by a wholly owned subsidiary of an American company abroad, even though the ore was shipped to the United States and American employees of the parent were objectioning to what they regarded as unfair wage competition arising from lack of effective organization among the foreign miners, although again the words literally apply. Words are not thus stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage. *Lauritzen v. Larsen*, 345 U.S. 571, 577–579, 581–582 (1953); as was said in regard to another type of labor regulation, "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose," *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 286 (1949).

The problem of workers directly engaged in transportation is more difficult; the stevedores stay on the piers, the miners remain in the mines, but the seamen come to the United States and return. The Board is right in saying the scope of its power in respect of the latter is not to be determined by the simple notion that a Honduran registered ship is a floating piece of Honduran territory; that is a mere "figure of speech" whose fictitious character was exposed

long ago, *Wildenhus' Case*, 120 U.S. 1 (1887); *Cunard SS. Co.* v. *Mellon*, 262 U.S. 100, 123–124 (1923).

Although Article 10 of the Treaty, which requires the United States to recognize Empresa's vessels as vessels of Honduras, also is not the end of our investigation, it surely must be the beginning. As was said with respect to the Jones Act in *Lauritzen* v. *Larsen*, 345 U.S. at 584–585, "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag" and, more generally, "the weight given to the ensign overbears most other connecting events in determining applicable law." How "cardinal" the importance is and how much "weight" should be given must depend, in the absence of clear expression by Congress, on what other factors of foreign and United States interest are present, and on the nature of the United States statute sought to be applied, taking particular account of the danger than an attempt to apply our law may result in a collision with the foreign sovereign. In the *Lauritzen* case the single United States factor, that Larsen had joined the crew and signed the articles in New York, was adjudged insufficient to tilt the scale against the law of the flag. So also, in *Romero* v. *International Terminal Co.*, 358 U.S. 354, 383–384 (1959), the factor that the injury occurred in New Jersey. On the other hand, in *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927 (2 Cir.), cert. denied, 287 U.S. 642 (1932), this court applied the Jones Act to the American demise-charterer of a Honduran registered vessel, as to an accident on the high seas to an American seaman hired in New York. See also the cases summarized in footnote 3 of the *Lauritzen* opinion, 345 U.S. at 573, and *Bartholomew* v. *Universe Tankships*, 263 F. 2d 437 (2 Cir.), cert. denied, 359 U.S. 1000 (1959).

Decisions in regard to the application of United States statutes dealing with seamen's wages are perhaps more directly relevant to our problem. A provision of the Seaman's Act of 1915, making it unlawful to pay wages in advance, 38 Stat. 1164, 1169, 46 U.S.C. § 599(e), was held inapplicable "when the contract and payment were made in a foreign country where the law sanctioned such contract and payment," even though the statute specifically extended to "foreign vessels while in waters of the United States," *Sandberg* v. *McDonald*, 248 U.S. 185, 194, 195 (1918), see also *Jackson* v. *S.S. Archimedes*, 275 U.S. 463 (1928). On the other hand, the 1920 amendment of § 4 of the Seamen's Act, 41 Stat. 1006, 46 U.S.C. § 597, granting seamen on United States vessels the right to demand half of their earned wages at every port and making the section applicable to "seamen on foreign vessels while in harbors of the United States," was construed to cover the suit of a British seaman on a British vessel under British articles in the light of a further provision that "the courts of the United States shall be open to such seamen for its enforcement." *Strathearn SS. Co.* v. *Dillon*, 252 U.S. 348 (1902).[10]

It is with this background that we come to *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957).

[10] The Court thought "the provisions of the act as the same are written" made plain "the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned * * *" 252 U.S. at 355. An abundance of legislative material leading to the same conclusion is summarized in the opinion that Mr. Justice Brandeis had prepared for possible delivery, see Bickel, The Unpublished Opinions of Mr. Justice Brandeis, pp. 35, 47 ff., reprinted in 69 Harv. L. Rev. 1177, 1190 ff. (1956), and *Monteiro* v. *Sociedad Maritima San Nicolas, S.A.*, 280 F. 2d 568, 573–574 (2 Cir.), cert. denied, 364 U.S. 915 (1960).

It involved the SS. Riviera, owned by a Panamanian corporation, sailing under the Liberian flag, and manned by a foreign crew, principally German and British, who had signed a British form of articles at Bremen, Germany. While the Riviera was in Portland, Oregon, loading a cargo of wheat destined for India, crew members struck because of a wage dispute, and picketed the vessel. The picketing was later continued by three American unions. The shipowner's action, in which federal jurisdiction was predicated on diverse citizenship, sought damages from these unions and their representatives, under Oregon law. The defense was that the Labor Management Relations Act had preempted the field; the Supreme Court held the defense unfounded. The opinion, by Mr. Justice Clark, stated, 353 U.S. at 143:

> Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees.

Mr. Justice Douglas dissented on the ground that "The case involves a contest between American unions and a foreign ship"; that since the foreign ship was in competition with American vessels paying higher wages, "American unions * * * have a vital interest in the working conditions and wages of the seamen aboard this foreign vessel"; that the picketing, on American soil, either was or was not a violation of § 303(a) (1) or (2) of the Taft-Hartley Act; that "even if we assume *arguendo* that the foreign vessel would not be subject to the regulatory provisions of the Act, it could nonetheless sue under § 303 (b) to get protection from any unfair labor practice

condemned by the Act"; hence Congress had occupied the field, 353 U.S. at 147–150. The only subsequent Supreme Court decision in this area is *Marine Cooks v. Panama S.S. Co.*, 362 U.S. 365 (1960). The holding, that the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 104, deprived a district court of jurisdiction to enjoin an American union from picketing, on American soil, a Liberian ship owned by one Liberian corporation and time-chartered to another and manned by a foreign crew, is without direct application to the problem here. No conflict with foreign governments or foreign laws is caused if Congress chooses to stay a Federal court from enjoining the picketing in the United States of a foreign flag ship involved in a labor dispute, as it did in the case of ships under our own flag until 1947 and still does so far as private suits are concerned, see *A. H. Bull S.S. Co. v. Seafarers' Int'l Union*, 250 F. 2d 326 (2 Cir. 1957). Hence the Court's conclusion that Congress intended the Norris-LaGuardia Act to apply in such a case does not support an inference that Congress intended the same with respect to the National Labor Relations Act—just as it does not show the contrary. However, in disapproving the Court of Appeals' reliance on *Benz* in reaching a contrary result, the Supreme Court said, at p. 369:

> The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the Labor Management Relations Act had no such scope or coverage and that it accordingly did not pre-empt the labor relations field so as to bar an action for damages for unlawful picketing under Oregon law.

The Board seeks to distinguish *Benz* on the ground that it involved no such indirect American ownership and no such regular coming and going from American ports as here. The "labor disputes between nationals of other countries operating ships under foreign laws," there said not to be covered by the Act, would thus not include a dispute where the employer was a wholly-owned subsidiary of an American corporation, also operating ships under our own flag, even when as here the subsidiary had been formed long before controversy arose and none of the ordinary bases for piercing the corporate veil exist, see *In re Gibraltor Amusements, Ltd.*, 291 F. 2d 22 (2 Cir.), cert. denied, —— U.S. —— (1961). Stress is laid upon the sentence in the *Benz* opinion, "The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing," 353 U.S. at 142, and upon the reference to "temporarily" in *Marine Cooks*. As against these respects in which the instant case is stronger than *Benz* for the application of the Labor Act, there is at least one in which it may be weaker. As Mr. Justice Douglas pointed out in his dissent, the *Benz* case did not directly involve the application of the panoply of labor regulation embodied in §§ 7, 8, 9 and 10, but only the provisions of § 303 of the Taft-Hartley Act relating to picketing, there wholly on American soil; it is hard to believe that foreign governments would be, or under international practice would have any right to be, concerned with whether the rights of their ships to damages for such picketing were governed by Federal or state law.[11] Here, on the other

[11] However, the Court may have thought that the liabilities imposed on unions by § 303 and the rights conferred by §§ 7, 8, 9 and 10 must be regarded as a single package, see Note, *The*

hand, application of §§ 7, 8, 9 and 10 of the National Labor Relations Act would involve the risk of continuous conflict between the United States and Honduras with respect to labor conditions which, though of more interest to the United States than those in *Benz*, are still Honduras' "primary concern," 336 U.S. at 286.

The case made by plaintiff's complaint goes far beyond the flying of the Honduran flag, important as *Lauritzen* teaches that to be. In this case there are also the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels' regular visits to Honduras, the Honduran corporate identity—admittedly not fictitious—of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters. Though the vessels are engaged in the foreign commerce of the United States, they are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed, for the purpose here at issue, by Honduras' interests.

Although the application of the Jones Act to accidents on foreign registered vessels involves the probability of rules of liability and amounts of recovery different from the law of the flag, as the discussions in *Lauritzen*, 345 U.S. at 575–576 and in *Romero*, 358 U.S. at 358, show, imposition of United States law on the rights of a seaman to recover against a ship owner or operator for personal injury is not likely to involve either party in a breach of contract with a third person or in

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Effect of United States Labor Legislation on the Flag-of-Convenience Fleet, 69 Yale L.J. 498, 518–519 (1960).

the violation of a foreign governmental requirement. The occasional application of the antitrust laws to activities abroad has not been without its problems, see *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.*, [1952] 2 All E.R. 780, 782, 784; *United States* v. *Holophane Co.*, 352 U.S. 903 (1956), even though the activity is usually of relatively small significance to the total economy of the foreign land. Here, on the allegations of the complaint, the conflict between United States and Honduran law would be constant;[12] far from dealing only with incidents while the ships were in American waters, the Board would be regularly applying the shifting standards of its own decisions, and those of American courts and American legislators, to conduct in Honduras, where the bargaining between Empresa and its employees has always taken place;[13] it would be endeavoring to enforce its will on matters that Honduras, with a better claim, regards as for itself to decide. Compare *Vanity Fair Mills* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633, 646–647 (2 Cir.), cert. denied, 352 U.S. 871 (1956). The situation here differs sharply from the United States informing itself as to contracts relating to the movement of traffic between the United States and a foreign country, *Kerr S.S. Co.* v. *United States*, 284 F. 2d 61 (2 Cir. 1960); *Montship Lines, Ltd.*, v. *Federal Maritime Board*, 295

[12] See the discussion in 69 Yale L.J. 498, 514–515 (1960).

[13] A wryly amusing illustration is furnished by the Board's explanation, in its opinion in this very case, fn. 23, that the existing collective bargaining agreement between Empresa and Marineros "is not a bar to this proceeding, assuming it would otherwise be so effective, because the decision herein is issuing after the expiration date of that contract. See: St. Louis Independent Packing Company, 122 NLRB 887, 889." One wonders how fully the Labor Court of Honduras is informed about the NLRB's "contract-bar" rule.

F. 2d 147, 153 (D.C. Cir. 1961), or even taking action with respect thereto, *Thomsen* v. *Cayser*, 243 U.S. 66 (1917). The case is appropriate for application of Mr. Justice Jackson's warning that "in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our laws to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction," 345 U.S. at 582. We realize that if the Labor Act is inapplicable, owners of foreign flag ships such as Empresa will be deprived of the protection against certain unfair labor practices by the Federal courts accorded employers subject to the Act by such provisions as § 10(1) and § 303; but the practical consequences of this are less serious than those of a contrary holding. At least so the owners think, with the apparent concurrence of the Supreme Court in *Benz*.

Our belief that the Labor Act should not be held applicable in a case such as this is reinforced by the Geneva Convention on the High Seas, ratified by the United States on March 24, 1961, but not yet effective for lack of required ratification by 22 nations. Article 5, § 1, of the Convention reads:

> Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

Discussion seems to have been centered on what happens if the "genuine link" does not exist;[14] neither the text nor such explanatory materials as we have found say specifically what happens if the conditions of the final sentence are met. Yet, since it was deemed so important to insist upon the existence of a "genuine link" and the flag state's effective exercise of "jurisdiction and control in administrative, technical and social matters over ships flying its flag," it would be unreasonable to conclude that when all this had been done other states do not owe some obligations of respect.[15]

Three other matters ought be mentioned before we conclude:

(1) We have not discussed the conflicting contentions as to the effect of Article 22 of the Treaty with Honduras, quoted in footnote 4—plaintiff arguing that application of the Labor Act would violate the

[14] The "genuine link" requirement as adopted was less stringent than proposals made by such governments as the United Kingdom and the Netherlands and by the International Labor Conference, "which would have enabled states other than the flag state to withhold recognition of the national character of a ship if they considered that there was no 'genuine link' between the state and the ship." Report of the Committee on Foreign Relations to the Senate, 106 Cong. Rec. 10382 (1960). The Senate was told that the effect of the language as adopted in Geneva is that "no state can claim the right to determine unilaterally that no genuine link exists between a ship and the flag state," but "Nevertheless, there is a possibility that a state, with respect to a particular ship, may assert before an agreed tribunal, such as the International Court of Justice, that no genuine link exists. In such event, it would be for the Court to decide whether or not a genuine link existed." *Id.*

[15] Although the Geneva Convention has not yet become effective, a convention representing such a consensus of thought by the leading maritime nations should be given weight by a United States court as evidence of international practice, especially after ratification by this country.

first clause, particularly in the light of the Supreme Court's statement in *Marine Cooks* quoted above, and defendant contending that the matter is one of "the execution of contracts" as to which the final sentence permits the application of "local laws." The problem is not an easy one; the view we take of the instant case makes it unnecessary for us to decide it.

(2) We realize that American unions understandably desire to organize vessels which they conceive to be in substance a part of this country's merchant marine, and that attempts to implement that desire can lead to a breach of the industrial peace which the Board is bound to promote, particularly when, as here, the stockholder of the foreign flag ships operates American flag vessels as well. Last summer's strike of the American merchant marine, with which we have some familiarity, see *United States* v. *National Marine Engineers Beneficial Assn.*, 294 F. 2d 385 (2 Cir. 1961), sufficiently demonstrates this. Therefore, we recognize that a controversy between an American union and Empresa could lead or tend to lead "to a labor dispute burdening or obstructing commerce or the free flow of commerce" carried on by American flag ships, as well as directly obstructing commerce carried on by foreign ones. However, that scarcely is decisive—the question still is how far Congress intended to permit the Board to intervene in what would normally be the affairs of a foreign government in order to prevent this. Even if we were to make the unrealistic assumption that Congress was so far-seeing as not only to have contemplated the growth of flags of convenience when it adopted the Labor Act in 1935,[16] but also to have anticipated cases

[16] The use of "flags of convenience" by United States' enterprises is said to have begun in an effort to make what had been American ships available for the transportation of needed

where an American company would operate some ships under our own flag and others through foreign subsidiaries flying the flags of other countries, we see no basis for believing Congress would have chosen to solve the problem by an exercise of jurisdiction which would create such a conflict with a foreign government as would seem inevitable here. Mr. Justice Clark's statement in *Benz*, 353 U.S. at 147, seems exceedingly apposite:

> For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the faculties necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.[17]

(3) In order to avoid any possible misunderstanding in this controversial area, we emphasize that we are deciding only the case before us; what the result should be when the contacts of the country of the flag

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cargoes to powers resisting Nazi aggression despite the Neutrality Act of 1939, 54 Stat. 4, 6 Benedict, Admiralty (1958), 219–220; Note, Pan-Lib-Hon Registration of American-Owned Merchant Ships: Governmental Policy and the Problem of the Courts, 60 Colum. L. Rev. 714, fn. 1 (1960). It has continued for economic reasons. See Note, *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet*, 69 Yale L. J. 498 (1960). The letter of the Secretary of Defense attached to the Attorney General's brief to the NLRB indicated that, as of 27 September 1960, the deadweight tanker tonnage available to the United States under "Panlibhon" (Panama, Liberia, Honduras) registry was some 120%, and the general cargo tonnage some 40%, of the United States flag tonnage.

[17] The Secretary of Labor has announced the creation of a three-man review board to study the flag of convenience controversy, N.Y. Times, Sept. 20, 1961, p. 47, col. 6.

are weaker relative to those of the United States than here, we do not say.[18]

The order denying a temporary injunction is reversed.

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[18] The Board decisions include *West India Fruit and Steamship Co., Inc.*, 130 NLRB No. 46, an unfair labor practice case now pending, on petition to review, in the Fifth Circuit; *Peninsular & Occidental SS. Co.*, 132 NLRB No. 1, also an unfair labor practice case; *Eastern Shipping Corp.*, 132 NLRB No. 72, and *Hamilton Bros., Inc.*, 133 NLRB No. 85, both representation cases, *Navios Corp* v. *National Maritime Union*, 402 Pa. 325, 166 A. 2d 625 (1960), cert. denied, 366 U.S. 905 (1961), and *Incres Steamship Co., Ltd.* v. *International Maritime Workers Union*, 10 N.Y. 2d 218, 219 N.Y.S. 2d 21, cert. granted, —— U.S. —— (1961), involved the applicability of state laws with respect to picketing, as against claims of federal preemption.

Civ No. 228

Opin 180

United States District Court, Southern District of New York

61 Civil 4413

EMPRESA HONDURENA DE VAPORES, S.A., PLAINTIFF

against

*IVAN C. MCLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD, DEFENDANT

PALMIERI, J.

This is a motion [1] for a preliminary injunction restraining defendant [2] from carrying out an order of

*2-RC-10379.

[1] The motion was brought by an order to show cause submitted Wednesday and returnable late in the afternoon of the Thursday preceding the Sunday on which the election was scheduled to commence, thus giving adverse parties little time in which to respond and forcing the Court to decide the complex questions of jurisdiction and injunctive relief under pressure of severe time limitations. Considering that the Board issued its order on November 17, 1961, and the plaintiff knew elections were scheduled to commence within 30 days thereof, this long delay in bringing the motion is unfortunate, particularly since the time was found to prepare printed motion papers.

[2] Only the Regional Director of the Second Region of the National Labor Relations Board is named as a defendant. It is clear that his responsibilities entail only the mechanics of executing the Board's direction of election. Whether fully effective relief requires the Court's order to reach the Board itself, and whether the members of the Board are indispensable

the National Labor Relations Board (Board) directing a representation election among the unlicensed seamen employees of Empresa Hondurena de Vapores, S.A. (Empresa). A complaint seeking permanent injunctive relief was filed simultaneously with the motion papers.

The election has been ordered to commence on December 17, 1961, on vessels owned or operated by plaintiff upon their arrival in United States ports and by mailing ballots to employees not aboard vessels scheduled to arrive in the United States between December 17, 1961 and January 31, 1962. Plaintiff is a Honduras corporation, operating vessels registered under the laws of Honduras and carrying the Honduran flag. The unlicensed seamen employed by plaintiff are, with the exception of one who is a citizen of Jamaica, all citizens of Honduras and, with the exception of four, all residents of Honduras. All are also members of a Honduran labor union, Sociedad Nacional de Marineros de Honduras,[3] which is certified by the Ministry of Labor of Honduras. Empresa is, however, a wholly owned subsidiary of United Fruit Company (United Fruit), a New Jersey corporation with its principal place of business at Boston, Massachusetts. Since the formation of Empresa it has, with a few possible exceptions, chartered all its vessels to United Fruit which uses them, for the most part, to carry produce of United Fruit's Latin American operations. It is the plaintiff's position that the Board, in making the order here in question, exceeded

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parties to the action, are questions unnecessary to determine, in view of what follows.

[3] This Union did not permit its name to be placed on the ballot. Another Honduran union, Sindicato Maritimo Nacional de Honduras, "Sindimar," the National Maritime Union of America, AFL-CIO, and "no union," are the three choices offered by the proposed ballot.

its powers under the Labor Management Relations Act of 1947, 29 U.S.C. Chapter 7, inasmuch as this Act has been held by the Supreme Court of the United States[4] to be inapplicable to labor relations between nationals of foreign countries operating vessels under foreign laws and their foreign workers. The plaintiff urges, in addition, that the Board's direction that the representation election be held, presents a substantial Constitutional question: that such action is in contravention of treaty obligations with the Republic of Honduras and therefore violative of Article VI of the Constitution.[5]

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[4] *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); cf. *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U.S. 365 (1960); *Afran Transport Company* v. *National Maritime Union*, 169 F. Supp. 416 (1958); *Bobolakis* v. *Compania Panamena Maritima San Gerasimo*, 168 F. Supp. 236, 238 (1958).

[5] Article VI of the Constitution provides, in pertinent part, as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; * * *" Assuming there is a conflict between the Board's action, properly exercised pursuant to the Labor Management Relations Act of 1947, and the Treaty of Friendship, Commerce, etc. between the United States and Honduras, dated December 7, 1927, 45 Stat. 2618 (1927), an interesting legal question is posed. It does not follow, however, that Congress' Constitutional powers are diminished by the prior treaty commitments of the United States. Since neither has intrinsic superiority over the other, the later Congressional enactment should prevail. *Leges posteriores priores contrarias abrogant* see *Edye* v. *Robertson* (*Head Money Cases*), 112 U.S. 580, 598–599 (1884); *Taylor* v. *Morton*, 23 Fed. Cas. No. 13,799 (1855); cf. *Cook* v *United States*, 288 U.S. 102 (1933).

THE JURISDICTION OF THIS COURT TO GRANT THE RELIEF REQUESTED BY THE PLAINTIFF

At the very outset, it is necessary to consider the Board's objection that this Court lacks jurisdiction over the subject matter of this action. The objection is based upon the proposition that an employer is not entitled to invoke the jurisdiction of a federal district court to review the Board's direction of a representation election because an adequate and exclusive statutory method of obtaining judicial review by the appropriate Court of Appeals has been provided.* The plaintiff, on the other hand, relies on the frequently cited and much discussed decisions in *Leedom v. Kyne*, 358 U.S. 184 (1958); and *Fay v. Douds*, 172 F. 2d 270 (2d Cir. 1949).

On the one hand there can be no doubt that the Labor Management Relations Act of 1947 manifested a clear Congressional recognition that to achieve the statute's basic policy of promoting collective bargaining dilatory litigation had to be avoided, that a restriction of the scope and method of review of labor determinations tended to achieve this result, and that such restriction tended to promote the efficient func-

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*49 Stat. 454 (1935) as amended, 29 U.S.C. § 160 (e), (f) (1952) provides that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals wherein the unfair labor practice in question was alleged to have been engaged in." This is the only provision for judicial review in the Act. The procedure for review of certification proceedings is set forth in § 9(d) providing that whenever an order of the Board is made pursuant to an unfair labor practices hearing and there is a petition for enforcement or review of the order by the court of appeals, the Board's certification is to be included in the transcript, and the validity of the whole representation determination is then open to judicial examination.

tioning of the Board as well.[7] Thus, it has come to be generally recognized that Board determinations in representation proceedings are not reviewable by district courts under their general equity jurisdiction.[8] But this generally settled rule is subject to two exceptions—those established by the two decisions upon which the plaintiff relies. The nature of these exceptions and their impact upon the general rule were succinctly explained by Judge Friendly in a recent opinion, *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127, 129–130 (2d Cir. 1960):

> Subsequently, two exceptions to this general rule excluding District Court jurisdiction to enjoin Board directions in representation matters have been recognized. The first was this Court's decision in *Fay* v. *Douds*, 2 Cir., 1949, 172 F. 2d 720, 723, relating to cases where the plaintiff advances a claim of denial of constitutional rights, in that case lack of procedural due process, which is "not transparently frivolous." Thereafter a second exception was announced, first by the Court of Appeals of the District of Columbia and later by the Supreme Court, in *Leedom* v. *Kyne*, 1957 101 U.S. App. D.C. 398, 249 F. 2d 490, 1958, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210, where the Board had acted in direct and in that case conceded contravention of a specific mandate of § 9, there § 9(b)(1).

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[7] See the Legislative History of the Labor Management Relations Act, 1947, (G.P.O. 1948); *Leedom* v. *Kyne*, 358 U.S. 185, 191–194 (1958); *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 405–411 (1940); *Fitzgerald* v. *Douds*, 167 F. 2d 714, 716–717 (2d Cir. 1948).

[8] *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127 (2d Cir. 1960); *McLeod* v. *Local 476*, 288 F. 2d 198 (2d Cir. 1961); *Leedom* v. *International Brotherhood of Electrical Workers*, 278 F. 2d 237 (D.C. Cir. 1960); *National Biscuit Division* v. *Leedom*, 265 F. 2d 101 (D.C. Cir. 1959). *Arb. denied*, 359 U.S. 1011 (1959).

Since there is no claim here of the Board's violation of any statutory mandate, the *Lee dom* v. *Kyne* exception does not apply. But there is present in this case the assertion of the deprivation of several Constitutional rights. Only one need be referred to since it is plainly one which is "not transparently frivolous."[9] It is urged not only by the plaintiff, but by the Attorney General of the United States when he intervened before the Board in these proceedings as amicus. At page 11 of his brief he stated:

> A refusal to treat merchant vessels flying the flag of Liberia and Honduras as vessels of those nations would be in direct conflict with our treaty obligations and would, as the Under Secretary of State has pointed out in his letter of October 27, 1960, to the Attorney General, a copy of which is included as Appendix A create serious difficulties in our foreign relations not only with nations signatory to these treaties but with other nations, such as Panama, which would be entitled to interpret a refusal to recognize the flag of the ship as a violation of the rules of international law upon which there had been mutual reliance.

Moreover, the Attorney General appended to his brief a communication from the Department of State signed by Under Secretary Douglas Dillon, dated October 27, 1960, expressing the Department's interest in these proceedings "based upon the important foreign rela-

[9] This language is that of Judge Learned Hand, writing for the unanimous Court in *Fay* v. *Douds*, 172 F. 2d 720, 723 (2d Cir. 1949):

"If this assertion of constitutional right is not transparently frivolous, it gave the District Court jurisdiction, and, having once acquired jurisdiction, the court might, and should, dispose of all other questions which arose, even though they would not have been independently justiciable."

tions considerations involved" and added, in part, as follows (p. 24 of Attorney General's brief):

> The Department of State believes that a proper reading of these Treaties requires that vessels under the flag of Liberia and Honduras and carrying the papers required by the national laws of those countries in proof of nationality, be recognized by the United States Government or any agency thereof as having the nationality of those countries. Therefore, the Department considers that any action by the Board purporting to consider such vessels as United States flag vessels, would be subject to a charge of violation of the above international agreements.

I cannot go as far as to say that a treaty violation may occur. It would seem sufficient, on the jurisdictional aspect of this case, to point out the formal assertions of important officials of the executive branch of the Government which tend to substantiate the plaintiff's claim on this point. I conclude therefor that there is present in this case one of the two grounds set forth by Judge Friendly permitting the assertion of jurisdiction by the District Court.

THE PLAINTIFF'S ENTITLEMENT TO INJUNCTIVE RELIEF

Assuming the valid assertion of jurisdiction by the District Court, I shall now deal with the considerations affecting the disposition of plaintiff's request that it be granted threshold injunctive relief. At the outset, I am not convinced of the probability of the plaintiff's success in sustaining the legal contentions in this case. I am constrained to note that although the Attorney General intervened before the Board, he has been silent before this Court. It may be, as the Board urges, that the Attorney General believes that

resort to the Court is, in any event, premature because the election sought to be enjoined is an interlocutory step in a representation proceeding, and it may lead nowhere if neither union wins. It is only if one of the two unions on the ballot wins, and it is certified by the Board as the collective bargaining representative that plaintiff will be placed under a legal obligation to bargain. And even in this contingency, the legal obligation is not enforceable until reviewed by the appropriate Court of Appeals as already stated. The plaintiff's assertions of immediate and irreparable damage by the holding of the election, without more, are unproved and unconvincing. It is not possible, on the record before me, to conclude that the plaintiff will suffer irreparable harm solely as a consequence of the holding of the election. I feel constrained to conclude that the interests of the many parties involved, particularly in the light of the lengthy and painstaking inquiry by the Board, do not justify the grant of the drastic threshold sanction invoked by the plaintiff.

Accordingly, the plaintiff's motion for a preliminary injunction is denied. It is so ordered.

Dated New York, N.Y., December 16, 1961.

EDMUND L. PALMIERI,
U.S.D.J.

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 2-RC-10379

UNITED FRUIT COMPANY AND NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Jacob Lazarus, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case,[1] the Board finds:

1. The Petitioner seeks a single fleet-wide unit of all unlicensed seamen employed aboard certain Hon-

[1] On May 31, 1960, the Board held a consolidated hearing for purposes of oral argument in *West India Fruit and Steamship Company Inc.*, 130 NLRB No. 46, *Peninsular & Occidental Steamship Company*, 132 NLRB No. 2, and *Eastern Shipping Corporation*, 132 NLRB No. 72, on certain issues concerning the jurisdiction of the Act over ships flying the flags of nations other than the United States and concerning policy considerations involved in the Board's assertion of jurisdiction over such vessels. Similar issues are raised in this proceeding. Thus, as it appeared that United Fruit Company, the Petitioner, and Sociedad Nacional De Marineros Honduras, a Honduran organization, might have a substantial interest in the outcome of the *West India* and other cases referred to above, they were invited to participate as *amicus curiae* in the oral argument. Only the Petitioner accepted the invitation

duran flag vessels which it alleges are beneficially owned and controlled by the United Fruit Company, here called UFCO, through its wholly owned foreign subsidiaries, Empresa Hondurena de Vapores, S.A.[2] and Balboa Shipping Corporation. UFCO contends that it is not, as alleged, the employer of the seamen involved and neither owns nor, as a time-charterer, operates the ships covered by the petition. Both UFCO and Empresa argue basically that as Empresa is a foreign corporation, is the employer of the seamen, and is engaged in its own business of operating and chartering the vessels, and as the vessels are of Honduran registry and the seamen of foreign nationality, the maritime operations involved are not within the jurisdiction of the Labor Act. Thus, the issue raised here concerns not only the effect upon the Act's jurisdiction of the foreign aspects adhering to Empresa's maritime operations, but also a determination of the relationship of Empresa and its operations to UFCO and its shipping trade.

As for the companies' argument based upon the flag law and other international law doctrine and upon certain treaties and conventions between the

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and appeared by counsel at the hearing. See, *West India Fruit and Steamship Company*, *supra*, pp. 1-2, footnote 5.

As set forth in our decision in the *West India* case, *supra*, p. 2, fn. 4, the Attorney General of the United States was permitted to intervene in this and the other three cases referred to above and in his brief, filed on November 18, 1960, presented on behalf of the Department of State and Department of Defense certain considerations of international law and national defense policy bearing upon issues common to the four cases.

[2] Empresa Hondurena de Vapores, a Honduran Corporation, moved to intervene on the ground that it was the employer of the employees covered by the petition. Empresa was, without opposition, permitted to intervene at the hearing and has participated fully at all stages of this proceeding.

United States and Honduras, such matters were dealt with at length in the Board's decision in *West India*. It was there concluded that the presence of such matters does not necessarily preclude the Act's coverage of a given maritime operation.[3] Similarly in the *Peninsular and Occidental*[4] and in the *Eastern Shipping*[5] cases it was held that the foreign incorporation of the legal owner and operator of a vessel and apparent employer of its crew did not alone take the vessel beyond the reach of the Act's jurisdiction.

However, none of these cases supports the proposition, in effect urged upon us here by the Petitioner, that underlying stock or other beneficial ownership and, thus, ultimate control of a foreign corporation and its operations by domestic United States interests necessarily bring the foreign corporation or its operations within the coverage of the Act. We do not read the Act as necessarily following United States investments abroad. It is the commerce of this nation, not of foreign nations, with which the Act is concerned. Also we are aware that international seaborne commerce will by its very nature involve insofar as this nation is concerned trade or transportation between foreign nations and a State. Nothing in the Act or relevant cases suggests, however, that all seaborne commerce reaching our ports on regular runs or sporadically is within the Act's coverage irrespective of other aspects of the operations.[6] In following the Supreme Court's *Lauritzen* decision,[7] the Board

[3] The treaty and consular conventions with Honduras are substantially the same as those with Liberia considered in the *West India* decision at pp. 19–21.

[4] 132 NLRB No. 1, at 5.

[5] 132 NLRB No. 72, at 5–6.

[6] See, *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); also, *Lauritzen* v. *Larsen*, 345 U.S. 571, 581 (1952).

[7] *Lauritzen* v. *Larsen*, *supra*.

has pointed out that the test of jurisdiction given commerce literally within Section 2(6) is whether there exist substantial contacts bewteen the "foreign" maritime operation and important United States interests.[8] Rather the problem is one of evaluating the many aspects of the operation and determining whether or not the shipping involved is essentially that of this nation and not that of a foreign nation which the exigencies of international trade have brought in contact with the United States.[9] Such a view clearly lends itself to the result that a foreign maritime operation can retain its essentially foreign nature and remain the commerce of a foreign nation outside the coverage of the Act despite underlying United States interests and certain commercial contacts with this country. At the same time, this view looks beyond the formal foreign aspects to determine if the maritime operation is in fact one primarily based in and operating out of the United States or essentially an adjunct of a domestic corporation's operations in the international trade of the United States, and, thus, is the shipping of this nation and, consequently, covered by the Act. It follows, as we emphasized in our *West India* decision (at pages 21 and 31) and as we reemphasize here, that the particular flag or nationality of the vessels involved, as such, plays no role in our determinations. Whether the flag or nationality be from our own hemisphere

[8] E.g., *West India*, *supra*, p. 15; *Eastern Shipping Corporation*, *supra*, at 2.

[9] *West India*, supra, 15; *Eastern Shipping Corporation*, supra, p. 6.

[10] Thus, in both the *Eastern Shipping* case at p. 5 and in *Hamilton Bros.*, 133 NLRB No. 85, p. 3, the Board noted in finding the Act applied that the U.S. contacts present were not just the result of the foreign seaborne trade of a truly foreign venture.

or across the seas, the controlling criteria are the same.

It is in the light of these considerations that we must approach the facts and issues before us in deciding the jurisdictional question. UFCO is a New Jersey corporation with its principal place of business at Boston, Massachusetts. Of its approximately 8.7 million outstanding shares of stock, over 8.5 million are owned by citizens of the United States. Its business interests extend world-wide and involve a rather diverse group of activities. However, it is primarily concerned with the raising of bananas, sugar, cacao and other tropical produce and with their transportation to market and sale. The bulk of its trade is between Central and South American locations and United States ports, and the value of its imports into this country exceed one million dollars annually, and are carried in large part on ships either owned or chartered by UFCO, including those subject of the present petition.

Though it is an operating company, UFCO also to a large extent carries out its operations through some fifty to sixty subsidiaries, many of which are foreign corporations such as Empresa, the subsidiary involved in this proceeding. The primary purpose of UFCO's operating through subsidiaries is to achieve, as its vice-president explained in his testimony, a decentralized control of the companies' many activities in which the subsidiaries, more or less specializing in particular types of undertakings, deal with the day-to-day problems of their operations while over-all policy and development control resides in the parent company. The extent and nature of that control is the subject of sharp disagreement between the Petitioner and the companies. But the record shows that, though day-to-day operations are in fact han-

dled by the subsidiaries themselves, long-range plans concerning expansion, contraction or other changes in the operation of subsidiaries are generally controlled by UFCO and its decision with respect to such matters is based not so much upon the needs or advancement of the subsidiaries as independent corporations, but rather upon the needs and planned development of UFCO's overall business in the production, transportation and sale of tropical produce.

Empresa is, as noted, one of UFCO's wholly-owned subsidiaries. It was organized under the laws of Honduras in 1941 by UFCO which supplied the capital for the venture. Empresa's officers are elected by its directors who are in turn elected by the sole stockholder, UFCO. There are, however, no interlocking directors with, or officers common to, Empresa and its parent. Furthermore, Empresa maintains all its own records, holds real estate in its own name, and otherwise appears to function as a distinct corporate entity. It is engaged in the business of owning and operating vessels registered under the laws of Honduras. However, it does not carry passengers or cargo on its own account. Rather, since its incorporation it has time chartered all its vessels and its income from its maritime operations, which exceeds $400,000 annually, is derived wholly from the charter fees. But Empresa does not, as the record shows, hold itself out to the shipping world generally as being engaged in the business of chartering vessels. On the contrary, since its formation its business has been limited with but a few possible exceptions [11] to

[11] It was stated in the record by several Company witnesses that Empresa chartered its vessels to UFCO and no other company. However, an exhibit shows that certain of the vessels had, on relatively rare occasions, been under charter to companies unrelated to UFCO; but, whether Empresa itself

chartering its vessels to UFCO, and the seventeen ships under its control at the time of the hearing and which are the subject of the petition [12] were so chartered.

As the owner and operator of the vessels under time charter, Empresa must provide ships that are fully equipped and ready to put to sea. Thus, it is responsible not only for the physical condition of the ships [13] and for provisioning them,[14] except for fuel, but also for hiring the officers and crews [15] and han-

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had so chartered the vessels or whether they were in fact rechartered by UFCO to the stranger companies does not appear. In either event, it remains clear that Empresa does not look to the general shipping market but rather to UFCO for the chartering of its vessels.

[12] Empresa owned 14 of these vessels. Three were owned by Balboa Shipping Corporation, a Panamanian Corporation wholly owned by UFCO. Empresa is the managing agent of such vessels which, like its own ships, fly the Honduran flag. Balboa is not at this time directly involved with the operation of its three vessels which are, for all practical purposes, as fully under Empresa's control as are its own vessels. As Empresa's control over the vessels of Balboa appears to be the same as that over its own vessels, it is unnecessary for the purposes of this decision to distinguish between the two groups of vessels. We note, moreover, that it is not contended that jurisdiction over Balboa's vessels turns on factors other than those also applicable to Empresa and its vessels.

[13] Empresa is responsible not only for day-to-day upkeep of the vessels but also for having the ships drydocked and repaired. Both are usually done in the United States. However, betterments for vessels or the purchase and scrapping of vessels are matters usually falling within the over-all policy control of UFCO.

[14] Supplies are purchased both in foreign nations and the United States. Most of what it buys in this country is purchased from Maratrop Trading Corporation, a wholly owned UFCO subsidiary.

[15] The crews are hired in Honduras, are composed almost wholly of citizens of that country, and sign Honduran shipping articles.

dling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel.[16] There is nothing in the record to suggest that Empresa does not in fact carry out these typical responsibilities of the owner of a vessel under a time charter.

UFCO, as the time charterer of the vessels, determines what voyages they shall make, their ports of call, their length of stay in various ports, and what cargoes they shall carry. In exercising its control, UFCO deals directly with the captain of the vessel involved. If it is dissatisfied with the handling of a vessel by its officers or crew or with its mechanical or other condition, it directs its complaints directly to Empresa, which is responsible for making any necessary changes. The ships are used, for the most part, to carry produce of UFCO's Latin American operations,[17] and on any given trip may call at ports in various Central and South American countries including those of Honduras. As the bulk of the trade is between such countries and the United States, the vessels regularly call at the ports of this nation. On their return trips to Latin America the ships carry cargo for various UFCO subsidiaries and also general cargo for shippers and consignees outside the UFCO organization.

The record further shows that the Empresa vessels are wholly integrated in UFCO shipping operations. Thus, UFCO bareboat charters from one of its U.S. subsidiaries or owns outright a number of cargo ships registered under the laws of the United States. These ships, like Empresa's, are under the jurisdiction of

[16] Empresa, as part of its control over personnel, has bargained with a Honduran organization as the representative of the crews of its vessels. See below, fn. 22.

[17] Some, if not all, of the ships also carry passengers.

UFCO's Marine Division, and the two groups of vessels are used interchangeably, carrying the same types of cargoes and calling at the same ports, both domestic and foreign. In assigning a vessel to a particular run, the determination as to which vessel to use is based on its availability, size and speed, not on its ownership or flag.

The facts, outlined above, show that the maritime operations before us come literally within the Act's definition of commerce as they encompass in large part, transportation and trade between foreign countries and States of this nation. They further demonstrate that the relationship between UFCO and Empresa is one in which the affairs of the subsidiary are designed essentially to further the shipping operations of the parent and not one in which Empresa is considered an independent undertaking whose success or failure is gauged by its role in the open market. Supporting this conclusion are, *inter alia*, (1) that Empresa's capital expenditures and other substantial changes in operations are tied to UFCO's sea-going transportation needs, both present and projected, (2) that Empresa, with but few possible exceptions, time-charters its vessels to UFCO only and does not look to the open market for business, and (3) that Empresa's vessels are utilized by UFCO as an integral and necessary part of its fleet of vessels and not chartered as an alternative to acquiring vessels elsewhere or only to meet particular contingencies that may arise.[18] Thus, the record shows that Empresa's

[18] In the situation where it or its subsidiaries' vessels cannot meet its needs, UFCO charters vessels from outside its family of companies. Also, it might be noted here that, in its annual reports, UFCO refers to the vessels involved in this proceeding as its own vessels and notes that certain vessels for foreign flag operations were built to its specifications, and so forth. There is nothing in such reports to indicate that UFCO considers the

maritime operations are a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation as described in Section 2(6) of the Act. It is also evident, and we find, that Empresa through its immediate authority and control over hiring and other terms and conditions of employment and UFCO through its control of Empresa and of the vessels and their operations are joint employers of the employees covered by the petition.[19]

We find, further, under the circumstances here that the maritime operations before us possess those substantial United States contacts which, under our decision in *West India*,[20] bring them within the jurisdictional coverage of the Act, despite the foreign registry of the vessels, Empresa's foreign incorporation, and the other foreign aspects present.[21] Ac-

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foreign flag vessels to be other than its own or to be otherwise than completely under its control.

[19] In so finding, we are not holding that a time charterer of a vessel is necessarily a joint employer of the vessel's crew irrespective of the other attendant facts.

As Balboa Shipping Corporation does not operate its three vessels time chartered to UFCO and does not hire or otherwise deal with the seamen on such vessels or affect their terms and conditions of employment and as Empresa has, as noted, authority over such matters. Balboa is not under the present arrangement an employer of the seamen on its vessels.

[20] 130 NLRB No. 46, pp. 14–15. Clearly, the United States contacts derive from the fact that the maritime operations involved are those of a domestic corporation. They are not the result of the international operations of a truly independent foreign maritime venture.

[21] See, also, *Peninsular & Occidental Steamship Co., supra; Eastern Shipping Corporation, supra;* and *Hamilton Bros., Inc., supra.*

cordingly, we conclude that Empresa and UFCO and their maritime operations subject of the petition are in, and affect, commerce within the meaning of Sections 2 (6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding. Thus, the companies' motions to dismiss on jurisdictional grounds are denied.

2. The labor organizations involved claim to represent certain employees of the Employers.[22]

3. A question affecting commerce exists concerning the representation of certain employees of the Employers within Section 9(c)(1) and Section 2 (6) and (7) of the Act.[23]

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[22] Following the close of the hearing in this case, Sindicato Maritimo Nacional De Honduras "Sindimar" sought to intervene in this proceeding on the basis of a card showing of interest. The Petitioner contends the request for intervention was not timely. We disagree, for the cards submitted in support of intervention were dated prior to the time of the close of the hearing. As we find that "Sindimar" is a labor organization, the motion to intervene is hereby granted. See, *Hamilton Bros. Inc.*, 133 NLRB No. 85.

Sociedad Nacional De Marineros De Honduras was listed in the petition as the bargaining representative of the employees in the alleged appropriate unit and the record shows that, at the time of the hearing, a contract between Sociedad Nacional and Empresa covering the employees was then in effect. Copies of the petition, of the notice of hearing, and other formal papers were not served on Sociedad Nacional. However, on June 7, 1961, the Board issued a notice, served on the parties and Sociedad Nacional, in which, *inter alia*, it accorded that organization a right to intervene and state its position on the issues by filing within 25 days a "Statement of Intervention" and a brief. As Sociedad Nacional did not reply to the notice, we conclude it is not interested in being a party to this proceeding, and we therefore do not consider it to be one.

[23] We find contrary to the contention of Empresa, that its contract with Sociedad Nacional in effect at the time the petition was filed but expiring in April 1961 is not a bar to this proceeding, assuming it would otherwise be so effective.

4. The following employees of the joint employers constitute a unit appropriate for the purposes of collective bargaining within Section 9(b) of the Act: all seamen employed upon the vessels owned or managed by Empresa Hondurena De Vapores, S.A., and jointly operated by the Employers, excluding guards, masters, other licensed officers, and all other supervisors.[24]

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees, who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and

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because the decision herein is issuing after the expiration date of that contract. See: *St. Louis Independent Packing Company*, 122 NLRB 887, 889.

[24] The unit appears substantially as requested by the Petitioner. Empresa and UFCO did not contend the unit is inappropriate in either scope or composition, but object to the unit on the grounds considered above and found without merit, i.e., that UFCO is not an employer of the employees and that the Board is without jurisdiction in this case.

employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by National Maritime Union of America, AFL–CIO; or by Sindicato Maritimo Naccional De Honduras, "Sindimar"; or by neither.

Dated, Washington, D.C.

[SEAL] FRANK W. MCCULLOCH,
Chairman,

BOYD LEEDOM,
Member,

JOHN H. FANNING,
Member,

GERALD A. BROWN,
Member,
National Labor Relations Board.

PHILIP RAY RODGERS, *Member,* dissenting:

For the reasons stated in my dissenting opinions in *West India Fruit and Steamship Company,* 130 NLRB No. 46, and *Hamilton Bros., Inc.*, 133 NLRB No. 85, I would dismiss the petition herein.

Dated, Washington, D.C.

PHILIP RAY RODGERS,
Member,
National Labor Relations Board.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. ~~802~~ 93

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,

against

EMPRESA HONDURENA DE VAPORES, S.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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STATUTES.

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28 U. S. C. §1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. .....

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

against

EMPRESA HONDURENA DE VAPORES, S.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit is not yet officially reported and is printed herein at pp. 5a-30a.

The opinion of the District Court for the Southern District of New York is reported at 200 F. Supp. 484 (1961) and is reprinted herein at pp. 31a-37a.

The Decision and Direction of Election of the National Labor Relations Board is reported at 134 NLRB No. 25 (1961) and is reprinted herein at pp. 38a-49a.

Jurisdiction.

The mandate of the Court of Appeals consisting of the opinion (5a-30a) and order of reversal (1a-2a) was issued on January 12, 1962 and filed in the District Court on January 30, 1962. The injunction of the District Court based on the mandate was filed on February 15, 1962 (3a-4a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Does the federal district court have original jurisdiction to review and enjoin an NLRB decision directing an election where no showing of violation of constitutional or express statutory rights has been made, and full judicial review of the Board's actions may be had in the circuit court after the election under the statutory review procedures of the Labor Management Relations Act (1947), Section 10(e) and (f) (29 U. S. C. §160(e) and (f)).

2. Does the NLRB have jurisdiction over the Honduran flag vessels of an American employer, United Fruit Company (UFCO), which are operated in United States commerce through a wholly owned and controlled Honduran subsidiary as part of a single integrated fleet of American and Honduran flag vessels used to carry the employer's own tropical produce to American markets?

Statutes Involved.

Petitioner contends that the maritime operations involved are within the jurisdictional coverage of the LMRA. Reprinted in the Appendix (50a) are the definitions of "commerce" and "affecting commerce" contained in the Act (29 U.S.C. §152(6) and (7)).

Statement of the Case.

Parties.

Petitioner (intervenor-defendant below) National Maritime Union of America, AFL-CIO (NMU) is an American maritime union comprised of approximately 40,000 non-officer seamen employed on vessels engaged in commerce on the deep seas and other navigable waters.

Respondent Empresa (plaintiff below) is a Honduran corporation wholly owned and controlled by UFCO which nominally holds title to UFCO's Honduran flag vessels.

The named defendant below was Ivan C. McLeod, Regional Director for the Second Region of the National Labor Relations Board. He has on his own behalf petitioned for certiorari to review the decision of the Court of Appeals for the Second Circuit.

The Operations of UFCO and Empresa in United States Commerce.

UFCO is a New Jersey corporation owned by American citizens (41a). It has world-wide diverse business interests but is primarily concerned with raising bananas, sugar, cacao and other tropical produce and their transportation to market and sale (41a). The bulk of its trade is between Central and South American locations and United States ports. It conducts its operations through a network of some fifty to sixty subsidiaries whose affairs are controlled and managed by it to advance its own commercial interests (42a). On the record before it, the NLRB found as a fact that in UFCO's relations with its subsidiaries (at 42a):

> ". . . long-range plans concerning expansion, contraction or other changes in the operation of sub-

sidiaries are generally controlled by UFCO and its decision with respect to such matters is based not so much on the needs or advancement of the subsidiaries as independent corporations, but rather upon the needs and planned development of UFCO's overall business in the production, transportation and sale of tropical produce."

Empresa is one such subsidiary. All of Empresa's directors are elected by UFCO, the sole stockholder, and they in turn elect officers (42a). While Empresa nominally holds title to the vessels involved in this case, it does not operate them for itself, but since its incorporation has time chartered all of them to UFCO, and its income derives wholly from charter fees (43a). Moreover, Empresa does not hold itself out in the world charter market as being in the business of chartering vessels. Its vessels are available to UFCO only (43a).

As the time charterer of the vessels, UFCO determines the voyages they shall make, the cargoes they shall carry, their ports of call and length of stay (44a). In exercising this control, UFCO issues instructions directly to the captains of the vessels (44a). Moreover, UFCO has wholly integrated and uses interchangeably its Honduran flag vessels sailing under the Empresa banner with American flag vessels it owns outright or bareboat charters from other subsidiaries (44a-45a). A vessel is assigned to a particular run based on its suitability from the standpoint of size or speed, and not its nominal ownership or flag (45a).

From these and other facts the Board found that Empresa's activities are "designed essentially to further the shipping operations of the parent (UFCO)"; and Empresa does not function as an independent enterprise "whose success or failure is gauged by its role in the open

market" (45a). The Board further found that Empresa and UFCO are joint employers and

> "... Empresa's maritime operations are a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation as described in Section 2(6) of the Act" (at 45a-46a).

The Board concluded that the substantial United States contacts of the vessels and the fact that they were clearly engaged in commerce and affect commerce brought them within the jurisdictional coverage of the Act, and ordered an election (45a-49a).

The Litigation.

Proceedings Before The NLRB

NMU initiated Board proceedings on or about November 24, 1959 by the filing of a representation petition seeking to be certified as bargaining representative for the non-officer crewmembers of the seventeen vessels UFCO operates in Empresa's name (38a-39a, 43a). A lengthy hearing followed by oral argument before the members of the Board ensued in which both UFCO and Empresa fully participated. The hearing was devoted almost exclusively to UFCO's and Empresa's defense that the Board lacked jurisdiction over the shipping operation involved (38a-39a). After the Board's decision upholding jurisdiction issued on November 15, 1961, extensive preparations were completed to hold the election which was scheduled to begin on Sunday, December 17, 1961 and continue through January 31, 1962 as each of the vessels involved touched United States ports (31a-32a).

Proceedings Before The District Court

In the late afternoon of Thursday, December 14, 1961, Empresa by order to show cause sought a temporary injunction in the United States District Court for the Southern District of New York, to enjoin the Board from proceeding with the election. The complaint (51a-59a) in substance alleged that the Board had exceeded its power in taking jurisdiction and thereby violated Empresa's rights under the United States Constitution, including the Fifth Amendment, and "principles of international law recognized and adhered to by the Department of State."

On Saturday, December 16, 1961, the District Court denied the application for a temporary injuction because it considered the likelihood of Empresa's ultimate success doubtful and found the "assertions of immediate and irreparable damage by the holding of the election, without more, are unproved and unconvincing" (37a).*

Proceedings Before The Court of Appeals

The Court of Appeals reversed the district court and directed that the injunction issue (15a-30a). Although a temporary injunction in form, in fact the Court of Appeals disposed of the entire case on the merits, and it did this on a record limited essentially to the complaint and the

*The election nevertheless did not begin the following day because at approximately the same hour that this decision was handed down, a Honduran labor union, Sociedad Nacional de Marineros de Honduras, which claims to represent the crewmembers on the vessels involved even though a majority have signed pledge cards for NMU, secured *ex parte* from the District Court of the District of Columbia a temporary restraining order enjoining the Board from proceeding with the election. The same union had previously declined at least two invitations from the Board to intervene in the proceedings and appear on the ballot in the secret election (38a, 47a). Another Honduran union, which after the close of the hearings but before the Board's decision, requested a place on the ballot was permitted to intervene (47a).

Board's decision. (The transcript of the Board hearing was not introduced by Empresa in support of its application for the injunction.) The Court of Appeals held first that the district court had original jurisdiction to review the Board's decision because of the "international aspects" (13a-17a). It then held that the vessels in question were not within the jurisdictional coverage of the Act, thereby reversing the Board.

Alleged Basis for Federal Jurisdiction In the First Instance.

Petitioner contends that the district court had no jurisdiction to review and enjoin the Board proceedings herein. The complaint alleges jurisdiction under Sections 1331 and 1337 of Title 28 of the United States Code (51a). The Court of Appeals, with some misgivings, upheld this jurisdictional claim (11a-13a).

Summary of Reasons for Granting Writ.

The Board has held the LMRA applicable to foreign flag ships in six recent cases: *West India Fruit and SS. Co.*, 130 NLRB 343, 47 LRRM 1269 (1961); *Peninsula and Occidental SS. Co.*, 132 NLRB No. 1, 48 LRRM 1293 (1961); *United Fruit Co.*, 134 NLRB No. 25, 49 LRRM 1138 (1961); *Owens-Illinois Glass Co.*, 136 NLRB No. 232, 49 LRRM 1777 (1962); *Hamilton Bros.*, 133 NLRB No. 85, 48 LRRM 1740 (1961); *Eastern Shipping Corp.*, 132 NLRB No. 72, 48 LRRM 1436 (1961). Review of *West India* and *Peninsula* is pending in the Fifth Circuit; *United Fruit* has been reversed by the Second Circuit in this case; and in *Owens-Illinois* the employer is seeking an injunction against the Board in the District Court for the District of Columbia.

In addition, the highest courts of New York and Pennsylvania have recently held that the question of Board jurisdiction is "arguable" and for the Board to decide. *Incres Steamship Company, Ltd.* v. *International Maritime Workers Union*, 10 N. Y. 2d 218 (1961); *Navios Corp.* v. *National Maritime Union*, 402 Pa. 325 (1960). The same result was reached by the District Court for the Southern District of New York in *Afran Transport Co.* v. *National Maritime Union*, 169 F. Supp. 416 (S. D. N. Y. 1958).

Conflicting claims as to the jurisdiction of the Board, federal courts, and state courts are thus involved in these controversies. This Court deemed the issues of sufficient importance to grant certiorari in *Incres Steamship Company, Ltd.* v. *International Maritime Workers Union*, *supra*, where the employer contends that the state court alone has jurisdiction over foreign flag ships and the Board has none. Review of the present case along with *Incres* would aid in clarifying this difficult and important problem and bring to an end pending litigation, since here the Second Circuit has held that the question of whether the Board has jurisdiction over particular foreign flag ships is to be decided by the federal district courts.

Certiorari should also be granted because the decision of the Court of Appeals represents a fundamental change in the long established rules (1) that Board determinations in election cases are, with narrow exceptions not present here, non-reviewable in the district courts (*Leedom* v. *Kyne*, 358 U. S. 185 (1958); and (2) that the Board has exclusive primary authority to determine its own jurisdiction in cases pending before it, and there may be no review of Board action until administrative remedies have been exhausted, and then only in the appropriate circuit

court as provided in Section 10(e) and (f) of the Labor Act (29 U.S.C. §160(e) and (f)) (*Myers* v. *Bethlehem Shipbuilding Corp.*, 503 U. S. 41 (1938)).

POINT I.

Certiorari should be granted to review the decision of the Court of Appeals which substitutes the District Court for the Board as the authority to determine LMRA application to foreign flag ships and gravely imperils any hope for a uniform solution for this important problem of federal labor law.

The rule is long settled that Board decisions in election cases are not reviewable by the district courts. *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401 (1940). Under Section 9(d) (29 U.S.C. §159(d)), of the Act, such decisions are reviewable only when they form the basis for a Board unfair labor practice order, and that order is before the Court of Appeals for review under Section 10(e) or (f) of the Act (29 U.S.C. §160(e) and (f)).

The aim of the statute is to eliminate drawn-out litigation which would frustrate the Act's basic purpose of minimizing industrial strife. Relevant legislative history is set forth in full in *Leedom* v. *Kyne*, 358 U. S. 185, 191-194 (1958); *American Federation of Labor* v. *NLRB*, 308 U. S. 401, 405-411 (1940); *Fitzgerald* v. *Douds*, 167 F. 2d 714, 716-717 (2d Cir. 1948); *Madden* v. *Brotherhood of Union of Transit Employees*, 147 F. 2d 439, 443-444 (4th Cir. 1945).

The statutory scheme expressly affords employers a full opportunity for review of unfavorable representation

decisions by refusing to bargain with the certified union. The resulting unfair practice case incorporates the record of the representation case for review by the Court of Appeals. This has uniformly been held to be the exclusive method for review by employers and was available to Empresa in this case. *Atlas Life Insurance Co.* v. *Leedom*, 284 F. 2d 231 (C. A. D. C. 1960); *General Cable Corp.* v. *Leedom*, 278 F. 2d 237, 239 (D. C. Cir. 1960); *Norris* v. *NLRB*, 177 F. 2d 26 (D. C. Cir. 1949); *Boyles Galvanizing Co.* v. *Waers*, 291 F. 2d 791 (10th Cir. 1961).

Because the review procedures available to employers under Section 9(d) are not available to unions, two narrow exceptions to non-reviewability have been recognized for district court actions brought by unions. In such cases review is allowable when Board action raises substantial constitutional questions. *Fay* v. *Douds*, 172 F. 2d 720 (2d Cir. 1949); or violates an expressed statutory command. *Leedom* v. *Kyne*, *supra*.

Aside from the fact that Empresa is an employer, its complaint does not come within either of these limited exceptions. As the Court of Appeals found, no clear statutory mandate exempts Empresa from the LMRA (14a); nor is Empresa entitled to such exemption as a matter of constitutional right (14a-15a). To justify judicial intervention here, the court was compelled to carve out an entirely new exception to the rule of non-reviewability, namely, that district courts may intercede where Board action ramifies into the "field of foreign relations" or has "international aspects" (15a-17a).

This exception for "international aspects" is very different from the *Fay* v. *Douds*, *supra*, or *Leedom* v. *Kyne*, *supra*, exceptions where the courts intercede to protect existing constitutional or statutory rights which are plainly

in jeopardy. Here the test for intercession is not the rights which require protection but the subject matter of the controversy before the Board. When "international aspects" are present, the Court of Appeals has held, the Board's primary authority to adjudicate the jurisdictional reach of the Act must yield to the district courts.

This is a drastic and we believe dangerous innovation in the traditional relationship between the Board, an independent administrative agency, and the courts which has been marked by a policy of non-interference. From the earliest days of the Wagner Act, this Court has required that when proceedings are pending before the Board the administrative processes of the agency must be exhausted before there may be judicial review of the controversy, including questions of jurisdiction, and then such review is allowable only through the appropriate circuit court as provided in section 10(e) or (f) of the Act (29 U.S.C. §160 (e) or (f)). *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938).

Under the "international aspects" test, parties dissatisfied with the way matters are progressing for them before the Board are invited to invoke the intervention of the district courts at almost any intermediate stage of the proceedings, as Empresa did here.

Every district judge in the nation is thereby made a potential arbiter of Board jurisdiction in the foreign flag field. This result will reduce to shambles the basic scheme of the LMRA wherein Congress to achieve a uniform national labor policy created the NLRB as a single paramount administrative or quasi-judicial authority to guide and regulate the development of federal labor law.

In *Amazon Cotton Mill* v. *Textile Workers Union*, 167 F. 2d 183 (4 Cir. 1948) the Fourth Circuit remarked on the havoc that would be wrought with the LMRA if the Act

were deemed to have the "effect of clothing each of the more than two hundred district judges of the country with the powers over unfair labor practices vested in the National Labor Relations Board. . . ." This Court has many times sounded the same warning. In *Garner* v. *Teamsters, Chauffeurs & Helpers, etc.*, 346 U. S. 485 (1953) it observed that (at pp. 490-91):

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so."

The conflicts envisioned have already appeared in this case. The Court of Appeals in its opinion carefully refrained from deciding this case "on an all or nothing basis" (16a). It rejected as a fiction the notion that a foreign ship is a floating piece of the country whose flag it flies; and emphasized that in another case where the contacts of the vessel with the flag state were different, it might very well uphold Board jurisdiction (20a-21a, 30a).

In a case involving the very same facts but a different plaintiff, the District Court for the District of Columbia reached the "all or nothing" result with a sweeping decision that the Board simply did not have jurisdiction over foreign flag ships. *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61, 49 LRRM 2434 (D. C. 1962).

We believe the Court of Appeals erroneously held that Empresa's operations do not come within the jurisdictional coverage of the LMRA. We appreciate, however, that this is not the first concern of this Court on a petition for certiorari. What should be of immediate concern, however, is that the Court of Appeals in reaching its decision largely ignored Empresa's United States contacts stressed by the Board in upholding jurisdiction, and instead emphasized other contacts which it found more persuasive. The court, for example, tended to overlook the Board's finding that Empresa was a controlled corporate device by means of which UFCO met its needs for waterborne transportation in United States commerce, and that Empresa's vessels were fully integrated with UFCO's American flag ships as part of a single unified maritime operation. These and other findings clearly establish that the Board's conclusion that it had jurisdiction over the vessels was amply supported by substantial evidence in the record as a whole and well within the bounds of agency discretion.

The Board has recently decided six cases in the foreign flag shipping field, i.e.: *West India Fruit and SS. Co.*, 130 NLRB 343, 47 LRRM 1269 (1961); *Peninsular and Occidental Steamship Co.*, 132 NLRB No. 4, 48 LRRM 1293 (1961); *Eastern Shipping Corp.*, 132 NLRB No. 72, 48 LRRM 1436 (1961); *United Fruit Co.*, 134 NLRB No. 25, 49 LRRM 1138 (1961); *Hamilton Bros.*, 133 NLRB No. 85, 48 LRRM 1740 (1961); *Owens-Illinois Glass Co.*, 136 NLRB No. 32, 49 LRRM 1777 (1962). Each of these cases has

required of the Board what this Court described in *San Diego Building Trades* v. *Garmon*, 359 U. S. 236, 242 (1959) as "*ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences" to determine the impact "on the entire scheme of federal labor policy and administration." No uniform fact situation is discernible to which a generalized formula applies.

Foreign flag ships may be owned and controlled outright by American corporations (*West India, Hamilton Bros.* and *Owens-Illinois*); or they may be owned and controlled by American interests operating through nominal foreign corporations (*Peninsular and Occidental, United Fruit; Cf. Navios Corp.* v. *National Maritime Union*, 402 Pa. 325 (1960)); or they may be owned by foreign interests and operated jointly through a foreign corporation and a domestic agency corporation (*Eastern; Cf. Incres SS. Co. Ltd.* v. *International Maritime Workers Union*, 10 N. Y. 2d 218 (1961)). The services engaged in by the vessels in each case similarly vary. They may operate as car ferries shuttling back and forth on short voyages between a United States port and a nearby foreign port (*West India*); they may carry passengers in the Caribbean cruise trade as does Incres (*Peninsular and Occidential* and *Eastern*); they may engage in the banana boat trade (*United Fruit Co.* and *Hamilton Bros.*); or they may tow barges loaded with pulpwood (*Owens-Illinois*). The proceeding may come before the Board on the petition or charge of a foreign union (*Hamilton Bros.*), or an American union (*West India, Peninsular* and *Occidental, Eastern, United Fruit, Owens-Illinois*).

In each one of these cases the Board was called upon to assemble and evaluate a unique array of facts and reach a determination as to whether it was dealing with an essentially domestic enterprise or something else—or whether

the foreign aspects of a particular case militated against the assertion of jurisdiction.

The Board's leading case, *West India*, is an outstanding opinion and speaks for itself as to the quality of the Board's dedication and sensitivity to the problem.

Faithfully following the guide lines set down by this Court in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) and reaffirmed in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959), the Board conceived of its task in *West India* as " 'ascertaining and valuing points of contact between the transactions and the governments whose competing laws are involved.' " (130 NLRB at 354). With respect to the Labor Act, the Board properly concluded that " 'foreign commerce of the United States' is both an important and necessary contact within the intent of *Lauritzen.*"

In employing the contacts test, the Board did not ignore flag doctrine or other principles of maritime or international law. It simply assigned to these factors their proper weight in the general reckoning.

Board determinations as to the jurisdictional reach of the Act have repeatedly been held entitled to great respect—certainly more respect than was afforded by the Court of Appeals in this case. *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U. S. 398 (1947). To its task the Board brings its vast experience and special competence in administration of the Act. No agency of government is better suited than the Board to gauge the impact on commerce of a particular shipping operation and evaluate other relevant statutory and economic considerations militating for or against application of the Act.

Moreover, as a single agency with exclusive jurisdiction to administer the LMRA, the Board is able to treat each ruling it is called upon to make in the foreign flag shipping field as part of a growing body of its own decisional law

applicable to the problem. This assures a uniform and systematic development of the law.

The district courts can be no substitute for the Board in this delicate and specialized adjudicatory process. Moreover, if federal district courts are held to have authority to determine Board jurisdiction over foreign flag ships, then state courts must have the same authority. This is precisely the position taken by the dissenting judges in *Incres SS. Co.* v. *International Maritime Workers Union*, 10 N. Y. 2d at 227-231 (1961).

Plainly, to permit all state and federal courts of original jurisdiction to determine under their general equity powers whether the Board does or does not have jurisdiction in a particular foreign flag case is bound to lead to a multiplicity of conflicting and disparate decisions. The result will be to place a premium on forum shopping in an area of federal labor policy where uniformity is particularly to be desired (*Local 174, Teamsters* v. *Lucas Flour Co.*, 30 L. W. 4167, 4170, 49 LRRM 2717, March 5, 1962).

POINT II.

For all of the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

HERMAN E. COOPER,
H. HOWARD OSTRIN,
Counsel for Petitioner National Maritime Union of America, AFL-CIO.

EUGENE N. SOSNOFF,
ROBERT H. SAND,
of Counsel.

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APPENDIX A.

Order of Reversal of United States Court of Appeals for the Second Circuit.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the twelfth day of January one thousand nine hundred and sixty two.

Hon. J. EDWARD LUMBARD
Chief Judge

Hon. HENRY J. FRIENDLY
Hon. THURGOOD MARSHALL
Circuit Judges

EMPRESA HONDURENA DE VAPORES, S. A.,
Plaintiff-Appellant,

v.

IVAN C. McLEOD, Regional Director for the Second Region of the NATIONAL LABOR RELATIONS BOARD,
Defendant-Appellee,

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Intervenor-Appellee.

61 Civ. 4413

U. S. District Court
Filed
Jan. 30, 1963
S. D. of N. Y.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Order of Reversal of United States Court of Appeals for the Second Circuit.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

A. DANIEL FUSARO
Clerk

A true copy

(SEAL)

s/ A. DANIEL FUSARO
Clerk

UNITED STATES
SECOND CIRCUIT
COURT OF APPEALS

(Reverse side)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Filed January 12, 1962

A. DANIEL FUSARO, Clerk

APPENDIX B.

Injunction of District Court Entered on Mandate of Court of Appeals.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

EMPRESA HONDURENA DE VAPORES, S. A.,

Plaintiff,

against

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board,

Defendant.

U. S. District Court
Filed
Feb. 16, 1962
S. D. of N. Y.
61 Civil 4413
Order.

A motion having been made by plaintiff for an order providing that the mandate of the United States Court of Appeals for the Second Circuit, consisting of the opinion of the Honorable Henry J. Friendly, Circuit Judge, concurred in by the Honorable J. Edward Lumbard, Chief Judge, and Thurgood Marshall, Circuit Judge, and the order of reversal of the United States Court of Appeals for the Second Circuit dated January 12, 1962, filed with the Clerk of this court on January 30, 1962, be made the order of this court and providing for the injunctive relief requested by plaintiff in the order to show cause dated December 12, 1961, and providing for the denial of the motion made by defendant for a dismissal of the action, and on motion of White & Case, attorneys for plaintiff, it is

1. ORDERED, that the mandate of the United States Court of Appeals for the Second Circuit, filed with the Clerk of the United States District Court for the Southern District

of New York on January 30, 1962, is hereby made the order of this court;

2. ORDERED, that pending the trial and adjudication of the issues raised by the complaint herein, the defendant, Ivan C. McLeod, Regional Director for the Second Region of the National Labor Relations Board, and all persons acting for or in concert or in participation with him who receive actual notice of this order by personal service or otherwise, are hereby enjoined from conducting a representation election among plaintiff's unlicensed seamen until the final hearing and determination of this action, and it is further

3. ORDERED, that security in the amount of $500 be furnished by plaintiff conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, and it is further

4. ORDERED, that the motion of defendant to dismiss the complaint be, and the same hereby is, denied.

Dated: New York, New York
February 15th, 1962

EDMUND L. PALMIERI
United States District Judge

APPENDIX C.

Opinion of the Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 233—September Term, 1961.

(Argued December 20, 1961 Decided January 12, 1962.)

Docket No. 27314

EMPRESA HONDURENA DE VAPORES, S.A.,
Plaintiff-Appellant,

—v.—

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board,
Defendant-Appellee,

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Intervenor-Appellee.

Before:

LUMBARD, *Chief Judge*,

FRIENDLY and MARSHALL, *Circuit Judges*.

Plaintiff appeals from an order of the District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*, denying a motion to enjoin defendant, Regional Director of the National Labor Relations Board, *pendente lite* from conducting a representation election on plaintiff's Honduran registered vessels. Reversed.

ORISON S. MARDEN (White & Case), New York, New York (Chester Bordeau and William D. Conwell, of Counsel), *for Plaintiff-Appellant.*

ALLAN I. MENDELSOHN (Stuart Rothman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington, D. C., and Samuel M. Kaynard, Regional Attorney, New York, New York), *for Defendant-Appellee.*

HERMAN E. COOPER, New York, New York, *for Intervenor-Appellee.*

ALFRED A. GIARDINO, New York, New York, *for United Fruit Company.*

FRIENDLY, *Circuit Judge:*

The complaint of Empresa Hondurena de Vapores, S.A., hereafter Empresa, against the Regional Director of the National Labor Relations Board, filed in the District Court for the Southern District of New York on December 12, 1961, made allegations which we summarize as follows:

(1) Empresa is a Honduran corporation, organized in 1941, with its principal office and place of business in Puerto Cortes, Honduras. It operates thirteen seagoing vessels, ten of which it owns and three of which are owned by Balboa Shipping Company, Inc., a Panamanian corporation, which, like plaintiff, is a wholly owned subsidiary of United Fruit Company, a New Jersey corporation. All the vessels are registered under the laws of Honduras and fly the Honduran flag.

(2) The vessels are manned by unlicensed seamen, some 335 in number, all but one of whom are citizens of Honduras (the one being a British subject), employed in Honduras

under Shipping Articles executed there. The vessels, all of which are time-chartered to United Fruit, ply between ports in Central and South America, the United States, Canada and Europe; all of them call regularly at Honduran ports for trade and renewal of Ship's Articles. Since 1941 the seamen have been represented by Sociedad Nacional de Marineros de Honduras, a Honduran labor union recognized by the Republic of Honduras, hereafter Marineros, as their collective bargaining agent. A collective bargaining agreement between Empresa and Marineros was made in 1957, to remain effective until April 15, 1959, and thereafter to be automatically renewed for successive two year terms in the absence of contrary notice; it now stands renewed until February 15, 1963. Honduras "has a long established and comprehensive system of laws and regulations governing all aspects of the ownership and operation of vessels registered in Honduras and the employment of personnel thereon"; under that law plaintiff is required to recognize Marineros as the exclusive bargaining agent of its unlicensed seamen, and labor grievances are handled by representatives of plaintiff and Marineros subject to the Ministry of Labor and the Labor Courts of Honduras.

(3) On November 15, 1961, the NLRB rendered a Decision and Direction of Election, 134 NLRB No. 25, which, as later modified, instructed the defendant Regional Director to conduct an election among plaintiff's seamen to determine whether they desired to be represented for collective bargaining purposes by National Maritime Union, AFL-CIO, by Sindicato Maritimo Nacional de Honduras ("Sindimar"), or by neither.[1] The Honduran Labor Code prohibits the exercise of functions by a union "so long as it does not have recognition of its juridic personality" or if its personnel is not at least 90% Honduran; National Maritime Union fails on both counts. Defendant has in-

[1] The Board's decision states that Marineros was notified the Board would grant it a right to intervene but did not reply.

formed plaintiff that the election is to take place, beginning December 17, 1961, on board vessels arriving in United States ports between December 17, 1961 and January 31, 1962, and by mailing ballots to employees on vessels not so scheduled.

Alleging that the Board's direction violated Article 10 of the Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618,[2] as well as the Constitution of the United States and principles of international law, plaintiff sought temporary and permanent injunctive relief. By order to show cause signed December 12, 1961, on an affidavit of counsel incorporating the allegations of the complaint, the motion for a temporary injunction was brought on for hearing before Judge Palmieri on December 14. The Regional Director moved to dismiss. He asserted that the District Court lacked jurisdiction over a direction for an election, that the request for relief was premature, that the members of the NLRB were indispensable parties defendant, and that in any event the Board's action was proper.

Relevant to the last contention are certain additional facts stated in the Board's opinion and not challenged before us: United Fruit Company is predominantly United States owned. The bulk of its trade is between Central and South American countries which grow bananas and other tropical produce, and the United States. Empresa's officers are elected by its directors who are elected by United Fruit, and Empresa has always time-chartered all its vessels, almost entirely to United Fruit. However, Empresa "appears to function as a distinct corporate entity," and

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[2] This states:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessel of the Party whose flag is flown."

"There is nothing in the record to suggest that Empresa does not in fact carry out * * * typical responsibilities of the owner of a vessel under a time charter," including "hiring the officers and crews and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel."[3] On the other hand, United Fruit determines the routing of Empresa's ships, communicating its desires and complaints to the captain or to some other officer of Empresa. The vessels regularly call at United States ports, carrying United Fruit cargo on inbound and outbound voyages and also general cargo on the latter; some of the ships also carry passengers. Empresa's vessels are used by United Fruit in the same manner as other chartered or owned vessels registered under United States law.

It should be observed also that the Attorney General, acting at the request of the Departments of State and Defense was permitted to appear as *amicus curiae* before the Board in this and related cases. Although the Attorney General's brief to the Board stated that it was not its "purpose * * * to support or oppose the position of the steamship companies or the position of the unions" (p. 2), it advanced (pp. 15-20) a list of proposed "principles to be applied in determining whether a vessel and its crew shall be deemed foreign and thus beyond the scope of the Act," and "submitted * * * that the flag, as a ready, recognizable, and accepted standard must be preferred pragmatically to any other and that in accordance with that standard, the indirect financial interest of American citizens in a foreign registered ship may not deprive a vessel of its status as a national of the country whose flag is flown."

Despite the time pressure created by plaintiff's failure to bring this action until almost the eve of the scheduled election, Judge Palmieri prepared a thoughtful opinion,

[3] In view of these and other specific findings of fact we consider the Board's statement that United Fruit is a "joint employer" to be an erroneous legal conclusion, which must be disregarded.

filed on December 16. Holding that the District Court had jurisdiction of the subject matter since, as he believed, plaintiff had made a colorable allegation of denial of constitutional rights see *Fay* v. *Douds*, 172 F. 2d 720, 723 (2 Cir. 1949), he nevertheless denied the injunction since he was not convinced of the probability of plaintiff's success or by its claims of irreparable damage from the election. He therefore deemed it unnecessary to decide at that time whether the members of the Board were indispensable parties.

Although a motion for a stay pending appeal was initially denied, the appeal itself was argued on December 20. Meanwhile the election had been stayed as the result of a temporary restraining order issued by the District Court for the District of Columbia in an action by Marineros against the members of the Board. The argument having convinced us that the case presented serious issues involving the relations of the United States with a foreign government and that no irreparable damage would be caused by a brief delay of the election, we then issued a stay pending determination of the appeal. We have reached a conclusion different from that of the District Judge.

Two other circumstances must be mentioned before we proceed further: Under date of December 15, 1961, the Department of State, through its Legal Adviser, forwarded to Judge Palmieri, without comment, a note dated November 29, 1961, from the Ambassador of Honduras, protesting against the Board's decision, which was claimed to violate Articles 10 and 22 of the Treaty of Friendship, Commerce and Consular Rights,[4] to involve an intrusion by the United

[4] Article 22 provides that "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular districts. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit."

States into an area exclusively occupied by Honduras, and to infringe established principles of international law; the communication did not reach Judge Palmieri until December 18, after his decision had been filed. On January 10, 1962, the Department of Justice submitted to the District Court for the District of Columbia a letter saying that although the Department of State "does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case."

1. The Jurisdiction of the District Court.

(1) Although the issue has not been raised, we must first consider whether the complaint, invoking 28 U. S. C. §§1331 and 1337, set forth a claim cognizable by a Federal district court, *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934). As subsequent discussion will show, the complaint advanced a claim arising under a treaty sufficient to come within §1331, whether or not the claim was meritorious; the difficulty with respect to §1331 is jurisdictional amount. When a plaintiff asserts the right to be free from regulation, "The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed." *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 181 (1936). Here the complaint alleged that "the matter in controversy exceeds the value of $10,000, exclusive of interest and costs," but no facts were pleaded to substantiate this, and it is not obvious that an election alone would cause damage in that amount. Hence, if the allegation had been put in issue, as it was in the *McNutt* case and in *K V O S, Inc.* v. *Associated Press*, 299 U. S. 269 (1936), and plaintiff had not supported it, Federal jurisdiction under §1331 could not be sustained. However, no such traverse was made and the allegation was not so clearly baseless that the court was bound to disregard it even in the absence of challenge, although the

court "might, of its own motion, have entered upon an inquiry to ascertain whether the cause was one over which it had jurisdiction," *K V O S, Inc.* v. *Associated Press, supra*, at 277.

Moreover, we think the complaint asserted a claim under §1337, giving district courts jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce • • •," without regard to the amount in controversy. The National Labor Relations Act is such an Act, *American Federation of Labor* v. *Watson*, 327 U. S. 582 (1946); *Capital Service, Inc.* v. *NLRB*, 347 U. S. 501 (1954); the question is whether the action here is one "arising under" it. In support of a negative answer it could be said that what plaintiff is asserting is a right to be free from the Act, not a right allegedly conferred by it. But §1337, like §1331, speaks not of a claim created by, but of an action arising under, an act regulating commerce; it would run counter both to the language and to the policy underlying the statute to hold that the jurisdictional grant did not include an action whose sole purpose is to challenge an order of a Federal agency sought to be justified by a Federal statute. Whatever might earlier have been thought because of language in *American Well Works Co.* v. *Lane & Bowler Co.*, 241 U. S. 257, 260 (1916), the later decision in *Smith* v. *Kansas City Title & Trust Co.*, 253 U. S. 180 (1921), seems to have crossed that bridge, see *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, 450 (1955); cases such as *Louisville & Nashville R.R.* v. *Mottley*, 211 U. S. 149 (1908), are distinguishable in that the action was to enforce a claim arising under state law, there a right under a contract, with the Federal statute a matter of defense, see also *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 672 (1950), whereas here, as in *Smith*, it is the proposed application of the Federal statute alone that gives rise to the action. We do not pretend the distinction to be altogether clear or satisfying; but if one line of cases or the other

has to be favored, considerations of good sense support those permitting the sphere of application of Federal statutes to be determined by Federal courts.[5]

(2) The next problem as to the jurisdiction of the District Court is presented by the first two grounds of defendant's motion to dismiss, best considered together, namely, that the court has no power to enjoin an order for an election, especially at the suit of the employer, and that plaintiff's resort to the courts is premature.

In *Local 1545, United Brotherhood of Carpenters* v. *Vincent*, 286 F. 2d 127 (2 Cir. 1960), we stated that Dis-

[5] Professor Mishkin believes it now to be settled "that an action for a judgment declaring the non-existence of such a federally created right in the other party also falls within the federal question statute." The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 179 (1953).

We have not overlooked that the action here is against a Federal officer—a circumstance which one feels ought make a difference but apparently, under existing statutes, doesn't. Simply as a matter of language it might be argued that if jurisdiction under 28 U. S. C. §1331 fails for lack of the required amount, the action would come within 28 U. S. C. §1346(a)(2) giving the district courts jurisdiction over "Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department • • •" But, apart from the inconsistency that one contention would assert the suit to be against the United States whereas the other would deny it, and the question whether §1346(a)(2), the successor of the Tucker Act, 24 Stat. 505 (1887), authorizes an injunction, see *United States* v. *Jones*, 131 U. S. 1 (1889); cf. *Hatahley* v. *United States*, 351 U. S. 173, 182 (1956), the argument would fail on the basis that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 689 (1949). An authority on the subject says, with respect to such suits against federal officers, that "Apart from situations where a method of judicial review is particularly prescribed by statute, the only grant of jurisdiction that includes such cases is that in matters 'arising under' the Constitution or the laws. This mode of treatment includes limitations, such as jurisdictional amount and the rule that federal questions must appear without anticipation of defenses, that have no place in actions against federal officials, which are necessarily of federal concern." Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemporary Problems 216, 220 (1918). *Deering Milliken, Inc.* v. *Johnston*, —— F. 2d ——, —— (4 Cir. 1961), might suggest that §10(c) of the Administrative Procedure Act, 5 U. S. C. §1009(c), could serve here as a special statutory provision such as Professor Wechsler mentions, but that would require us to decide whether the NLRB's direction of election constituted "final agency action" within the meaning of that Act.

trict Court jurisdiction to enjoin Board directions in representation matters had been recognized in two types of cases, namely, (i) where plaintiff made an assertion, "not transparently frivolous," that failure to enjoin would deny rights guaranteed by the Constitution, *Fay* v. *Douds*, 172 F. 2d 720, 723 (2 Cir. 1949), and (ii) where the Board had acted in plain contravention of a specific mandate of the Act, *Leedom* v. *Kyne*, 249 F. 2d 490 (D. C. Cir. 1957), aff'd 358 U. S. 184 (1958). The instant case does not come within the second exception; although we conclude that the Board erred, its error was far from "plain," *International Assn. of Tool Craftsmen* v. *Leedom*, 276 F. 2d 514, 516 (D. C. Cir. 1960). Neither, with all respect to the learned District Judge, do we think it came within the first. Assuming as we do that the claim that the Board's action violated Article 10 of the 1927 Treaty with Honduras, see fn. 2, was "not transparently frivolous," a claim that such action violated any constitutional rights of plaintiff would be. For, apart from the uncertainty how far a treaty confers rights upon nationals of the foreign state as distinguished from the state itself, see American Law Institute, Restatement of the Foreign Relations Law of the United States, Tent. Draft No. 5, §§109 and 110; cf. *Asakura* v. *Seattle*, 265 U. S. 332 (1924) and 28 U. S. C. §1350, the Constitution does not prohibit Congress from legislating in violation of a treaty, *The Cherokee Tobacco*, 11 Wall. 616 (1870); *Head Money Cases*, 112 U. S. 580, 597-600 (1884), or directing its delegate to that end. On the other hand, the courts will not assume such a purpose on the part of Congress unless "clearly expressed," *Cook* v. *United States*, 288 U. S. 102, 119-120 (1933); *Whitney* v. *Robertson*, 124 U. S. 190, 194 (1888)—for one reason because such a violation would involve the United States in a claim for breach of its international obligation, Restatement of the Foreign Relations Law of the United States, Tent. Draft No. 3, §128. Any benefit plaintiff takes from the

Treaty thus goes to statutory interpretation, not to constitutional right.

However, the failure of the complaint to come within either of the categories of actions to enjoin representation orders that have heretofore been sustained is not fatal; the book has not been closed for all time. *Leedom* v. *Kyne*, *supra*, must be taken to have determined that, whatever may be the case with respect to orders of the National Mediation Board as to bargaining units, see *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943); *U. N. A. Chapter, Flight Engineers International Assn.* v. *National Mediation Board*, 294 F. 2d 905 (D. C. Cir. 1961), cert. denied, ——U. S.—— (1962), representation orders of the NLRB have not been vested with complete immunity from injunction, either by inferences from the National Labor Relations Act or on the principle of *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41 (1938). Once that step has been taken, the courts must make up their minds, as best they can, whether in a particular type of case Congress would or would not have wished them to intervene against "agency action taken in excess of delegated powers," 358 U. S. at 190. The considerations as to delay from judicial intervention, persuasively marshalled in Mr. Justice Brennan's dissent for Mr. Justice Frankfurter and himself in *Leedom* v. *Kyne*, *supra*, at 191-196, argue for a negative answer in the usual case, having purely domestic significance, where the Board is alleged to have acted wrongly, although not plainly so; hence we gave such an answer in the *Local 1545* case and in *McLeod* v. *Local 476*, 288 F. 2d 198 (2 Cir. 1961), as the Court of Appeals for the District of Columbia has done in numerous cases cited in the *Local 1545* opinion.[6] An altogether different

[6] We take it that the point of the "plain contravention" requirement is to close the doors of the courts at the very outset to actions for injunctions in representation matters, which, though ultimately found unmeritorious, would have accomplished much of their objective by the very time required for judicial consideration. An inevitable corollary of the requirement is that a court must sometimes refuse to entertain a complaint asserting what it regards as a valid claim.

situation is presented when, as here, there is a substantial claim that the Board is exceeding its jurisdiction in the field of foreign relations and is thereby offending a friendly foreign government; we cannot believe Congress would have wished to limit the role of the courts in that situation to cases where the Board had violated a "clear statutory command," *Leedom v. Norwich, Connecticut Printing Specialties and Paper Products Union*, 275 F. 2d 628 (D. C. Cir.), cert. denied, 362 U. S. 969 (1960), as against a command not so clear. Not only is the case in favor of judicial action stronger than in the typical domestic representation dispute, but the practical objections against it are weaker. Here the Board is entering a new and sensitive area of activity; while we do not assert that its jurisdiction with respect to foreign-flag ships is to be decided on an all or nothing basis, the significant variations among the fact patterns are sufficiently few that guidelines ought soon be pricked out by the courts[7]—failing the more desirable solution of new legislation—and the problem will thus not be a constantly recurring one.

Assuming that the principle of *Leedom* v. *Kyne* may be thus extended in a proper case, two further problems must be faced. One is that here the suit is by the employer who, arguably, is sufficiently protected by the possibility of sitting out the election and certification, continuing to recognize the existing union, awaiting the filing of an unfair labor practice charge for so doing, and, when held for this, bringing the direction of election before a court of appeals, as provided in §9(d) of the Act, on enforcement or review proceedings under §10(f). The second is that, unlike *Leedom* v. *Kyne*, the instant action was brought to enjoin an election rather than a certification. See Cox, The Major Labor Decisions of the Supreme Court, October Term 1958,

[7] The Supreme Court has already granted certiorari, —— U. S. —— (1961), in a case involving one rather typical pattern, *Incres Steamship Co., Ltd.* v. *International Maritime Workers Union*, 10 N. Y. 2d 218, 219 N. Y. S. 2d 21 (1961).

reprinted in Gellhorn and Byse, Administrative Law: Cases and Comments (1960 ed.), 441, 447-448.

An answer to the first point may be that, as shown in 73 Harv. L. Rev. 84, 219-220 (1959), the possibility of the plaintiff's precipitating an unfair practice charge was present in *Leedom* v. *Kyne* itself; yet the Court evidently did not deem this fatal. An answer to the second, in the circumstances here, is that, with Marineros not on the ballot, the situation was not one, such as in *Local 1545*, where a victory by a particular union at the polls might eliminate any need for resorting to the courts; here, whether the winner was N M U, Sindimar, or "no-union," plaintiff would suffer by being obliged to breach its contract with Marineros and, on the allegations of its complaint, to violate Honduran law by doing so. Sufficient though these answers may be, a more generally satisfying one is again the distinction between a case with international aspects and one without. If action ordered by the Board would trench on the jurisdiction of a foreign government contrary to the will of Congress, the best time to stop it is before the offense occurs, not somewhere along the line.

(3) The final problem as to the power of the District Court to entertain the action arises from the contention of the Regional Director[8] that the action must be dismissed since the members of the Labor Board were indispensable parties-defendant but were not named as such and could not have been served with process in the Southern District of New York and would have had a valid venue objection, 28 U. S. C. § 1391(b), if they had been.

So far as we have been able to determine, this precise question has not been squarely decided by any court of appeals. It has provoked differences of opinion in the district courts. In *American Communications Ass'n* v. *Schauf-*

[8] The Board's order of November 15 provided: "The Regional Director . . . shall direct and supervise the election"; the supplemental order of December 5 provided "for the conduct of the election as the discretion of the Regional Director."

fler, 80 F. Supp. 400 (E. D. Pa. 1948), a three-judge court with one judge dissenting, and in *White* v. *Douds*, 80 F. Supp. 402 (S. D. N. Y. 1948), Chief Judge Ryan, held that the Board members were essential parties-defendant. In *Local 1545, United Brotherhood of Carpenters* v. *Vincent*, 187 F. Supp. 921 (S. D. N. Y. 1960), Judge Dimock took a contrary view, citing *Williams* v. *Fanning*, 332 U. S. 490 (1947); in affirming his dismissal of the complaint on other grounds, we expressly did not pass upon that issue, 286 F. 2d at 129. *Deering Milliken, Inc.* v. *Johnston*, —— F. 2d —— (4 Cir. 1961), lends support to Judge Dimock's position, although it involved the conduct of a hearing rather than of an election directed by the Board.

Williams v. *Fanning, supra*, upheld a suit to enjoin a postmaster from carrying out a fraud order of the Postmaster General. The rule there stated, 332 U. S. at 493-494, is that "the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him" but not "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court"; it is immaterial, in the latter event, that the subordinate "would be left under a command of his superior to do what the court has forbidden." This would seem to carry the day for plaintiff save for defendant's contention that the Board is not required to have an election conducted by the regional director, citing §102.69 of its Rules and Regulations—the implication being, we suppose, that a decree against the regional director would not "effectively" grant relief since the Board could circumvent the decree by ordering someone else to conduct the election. We need not consider whether a response that the Board could not do any such thing, since the decree would be *res adjudicata*, would be circular reasoning or not; see 3 Davis, Administrative Law Treatise (1958), pp. 602-603.

For the Supreme Court, when confronted with an essentially similar contention with respect to the need for joining the Commissioner of Immigration and the Attorney General with the District Director in the review of a deportation order, deemed it enough to say, "But we need not decide the effect of such a judgment. We cannot assume that a decision on the merits in a court of appeals on a question of this kind, subject to review by this Court, would be lightly disregarded by the immigration authorities." *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 53 (1955). Significant also, and quite applicable here, is the Court's statement in that case, "Undoubtedly the Government's defense can be adequately presented by the District Director who is under the supervision of the Commissioner."[9] We hold the members were not necessary parties.

II. *The power of the Board to direct an election.*

Although the appeal is from denial of a temporary injunction, there appears to be no real dispute on factual matters. The case came before the District Judge on plaintiff's application for an injunction and the Board's motion to dismiss the complaint; hence we shall assume for the purposes of this opinion that the facts are as stated above, although the parties will be free to challenge them at a trial on final relief. The issue being one of law, the standard is whether we think the District Judge was wrong, not whether he was "clearly" so, *Carroll* v. *Associated Musicians*, 295 F. 2d 484, 488-489 (2 Cir. 1961), and cases cited.

The defendant's position proceeds from the basis that §9(c) of the Act authorizes direction of an election if the Board has determined that "a question of representation affecting commerce exists"; that "affecting commerce" is

[9] See Notes, Williams v. Fanning Revisited: The Indispensable Superior in Judicial Review of Administrative Actions, 54 Colum. L. Rev. 1128 (1954); The Doctrine of Indispensable Parties as Applied in Review of Administrative Action, 103 U. of Pa. L. Rev. 238 (1954).

defined by §2(7) to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce"; and that §2(6) defines commerce to include "trade, traffic, commerce, transportation or communication • • • between any foreign country and any State, Territory, or the District of Columbia." *Literally the words cover the case.* Yet the Board would hardly insist that the words apply to everything within their literal reach; we have not heard it suggested that the Board considers its power to extend to the stevedores who load Empresa's ships in Honduras although they are engaged in "commerce" quite as much as the seamen who man them. Neither do we suppose the Board would think it could direct an election among miners employed by a wholly owned subsidiary of an American company abroad, even though the ore was shipped to the United States and American employees of the parent were objecting to what they regarded as unfair wage competition arising from lack of effective organization among the foreign miners, although again the words literally apply. Words are not thus stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage, *Lauritzen* v. *Larsen*, 345 U. S. 571, 577-579, 581-582 (1953); as was said in regard to another type of labor regulation, "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose," *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 286 (1949).

The problem of workers directly engaged in transportation is more difficult; the stevedores stay on the piers, the miners remain in the mines, but the seamen come to the United States and return. The Board is right in saying the scope of its power in respect of the latter is not to be determined by the simple notion that a Honduran regis-

tered ship is a floating piece of Honduran territory; that is a mere "figure of speech" whose fictitious character was exposed long ago, *Wildenhus'* case, 120 U. S. 1 (1887); *Cunard SS. Co.* v. *Mellon*, 262 U. S. 100, 123-124 (1923).

Although Article 10 of the Treaty, which requires the United States to recognize Empresa's vessels as vessels of Honduras, also is not the end of our investigation, it surely must be the beginning. As was said with respect to the Jones Act in *Lauritzen* v. *Larsen*, 345 U. S. at 584-585, "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag" and, more generally, "the weight given to the ensign overbears most other connecting events in determining applicable law." How "cardinal" the importance is and how much "weight" should be given must depend, in the absence of clear expression by Congress, on what other factors of foreign and United States interest are present, and on the nature of the United States statute sought to be applied, taking particular account of the danger that an attempt to apply our law may result in a collision with the foreign sovereign. In the *Lauritzen* case the single United States factor, that Larsen had joined the crew and signed the articles in New York, was adjudged insufficient to tilt the scale against the law of the flag. So also, in *Romero* v. *International Terminal Co.*, 358 U. S. 354, 383-384 (1959), the factor that the injury occurred in New Jersey. On the other hand, in *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927 (2 Cir.), cert. denied, 287 U. S. 642 (1932), this court applied the Jones Act to the American demise-charterer of a Honduran registered vessel, as to an accident on the high seas to an American seaman hired in New York. See also the cases summarized in footnote 3 of the *Lauritzen* opinion, 345 U. S. at 573, and *Bartholomew* v. *Universe Tankships*, 263 F. 2d 437 (2 Cir.), cert. denied, 359 U. S. 1000 (1959).

Decisions in regard to the application of United States statutes dealing with seamen's wages are perhaps more

directly relevant to our problem. A provision of the Seamen's Act of 1915, making it unlawful to pay wages in advance, 38 Stat. 1164, 1169, 46 U. S. C. §599(e), was held inapplicable "when the contract and payment were made in a foreign country where the law sanctioned such contract and payment," even though the statute specifically extended to "foreign vessels while in waters of the United States," *Sandberg* v. *McDonald*, 248 U. S. 185, 194, 195 (1918), see also *Jackson* v. *S.S. Archimedes*, 275 U. S. 463 (1928). On the other hand, the 1920 amendment of §4 of the Seamen's Act, 41 Stat. 1006, 46 U. S. C. §597, granting seamen on United States vessels the right to demand half of their earned wages at every port and making the section applicable to "seamen on foreign vessels while in harbors of the United States," was construed to cover the suit of a British seaman on a British vessel under British articles in the light of a further provision that "the courts of the United States shall be open to such seamen for its enforcement," *Strathearn S.S. Co.* v. *Dillon*, 252 U. S. 348 (1902).[10]

It is with this background that we come to *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U. S. 138 (1957). It involved the *SS. Riviera*, owned by a Panamanian corporation, sailing under the Liberian flag, and manned by a foreign crew, principally German and British, who had signed a British form of articles at Bremen, Germany. While the *Riviera* was in Portland, Oregon, loading a cargo of wheat destined for India, crew members struck because of a wage dispute, and picketed the vessel. The picketing was later continued by three American unions. The ship-

[10] The Court thought "the provisions of the act as the same are written" made plain "the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned * * *" 252 U. S. at 355. An abundance of legislative material leading to the same conclusion is summarized in the opinion that Mr. Justice Brandeis had prepared for possible delivery, see Bickel, The Unpublished Opinions of Mr. Justice Brandeis, pp. 35, 47 ff., reprinted in 69 Harv. L. Rev. 1177, 1190 ff. (1956), and *Monteiro* v. *Sociedad Maritima San Nicolas, S.A.*, 280 F. 2d 568, 573-574 (2 Cir.), cert. denied, 364 U. S. 915 (1960).

owner's action, in which federal jurisdiction was predicated on diverse citizenship, sought damages from these unions and their representatives, under Oregon law. The defense was that the Labor Management Relations Act had pre-empted the field; the Supreme Court held the defense unfounded. The opinion, by Mr. Justice Clark, stated, 353 U. S. at 143:

> "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees."

Mr. Justice Douglas dissented on the ground that "The case involves a contest between American unions and a foreign ship"; that since the foreign ship was in competition with American vessels paying higher wages, "American unions • • • have a vital interest in the working conditions and wages of the seamen aboard this foreign vessel"; that the picketing, on American soil, either was or was not a violation of §303(a)(1) or (2) of the Taft-Hartley Act; that "even if we assume *arguendo* that the foreign vessel would not be subject to the regulatory provisions of the Act, it could nonetheless sue under §303(b) to get protection from any unfair labor practice condemned by the Act"; hence Congress had occupied the field, 353 U. S. at 147-150. The only subsequent Supreme Court decision in this area is *Marine Cooks* v. *Panama S.S. Co.*, 362 U. S. 365 (1960). The holding, that the Norris-LaGuardia Act, 29 U. S. C. §§101, 104, deprived a district court of jurisdiction to enjoin an American union from picketing, on American soil, a Liberian ship owned by one Liberian corporation and time-chartered to another and manned by a foreign crew, is without direct application to the problem here. No conflict with foreign governments or foreign laws

is caused if Congress chooses to stay a Federal court from enjoining the picketing in the United States of a foreign flag ship involved in a labor dispute, as it did in the case of ships under our own flag until 1947 and still does so far as private suits are concerned, see *A. H. Bull S.S. Co.* v. *Seafarers' Int'l Union*, 250 F. 2d 326 (2 Cir. 1957). Hence the Court's conclusion that Congress intended the Norris-LaGuardia Act to apply in such a case does not support an inference that Congress intended the same with respect to the National Labor Relations Act—just as it does not show the contrary. However, in disapproving the Court of Appeals' reliance on *Benz* in reaching a contrary result, the Supreme Court said, at p. 369:

> "The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the Labor Management Relations Act had no such scope or coverage and that it accordingly did not pre-empt the labor relations field so as to bar an action for damages for unlawful picketing under Oregon Law."

The Board seeks to distinguish *Benz* on the ground that it involved no such indirect American ownership and no such regular coming and going from American ports as here. The "labor disputes between nationals of other countries operating ships under foreign laws," there said not to be covered by the Act, would thus not include a dispute where the employer was a wholly-owned subsidiary of an American corporation, also operating ships under our own flag, even when as here the subsidiary had been formed long before controversy arose and none of the ordinary bases for piercing the corporate veil exist, see *In re Gibraltor Amusements, Ltd.*, 291 F. 2d 22 (2 Cir.), cert. denied,

—— U. S. —— (1961). Stress is laid upon the sentence in the *Benz* opinion, "The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing," 353 U. S. at 142, and upon the reference to "temporarily" in *Marine Cooks.* As against these respects in which the instant case is stronger than *Benz* for the application of the Labor Act, there is at least one in which it may be weaker. As Mr. Justice Douglas pointed out in his dissent, the *Benz* case did not directly involve the application of the panoply of labor regulation embodied in §§7, 8, 9 and 10, but only the provisions of §303 of the Taft-Hartley Act relating to picketing, there wholly on American soil; it is hard to believe that foreign governments would be, or under international practice would have any right to be, concerned with whether the rights of their ships to damages for such picketing were governed by Federal or state law.[11] Here, on the other hand, application of §§7, 8, 9 and 10 of the National Labor Relations Act would involve the risk of continuous conflict between the United States and Honduras with respect to labor conditions which, though of more interest to the United States than those in *Benz*, are still Honduras' "primary concern," 366 U. S. at 286.

The case made by plaintiff's complaint goes far beyond the flying of the Honduran flag, important as *Lauritzen* teaches that to be. In this case there are also the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels' regular visits to Honduras, the Honduran corporate identity—admittedly not fictitious—of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters. Though the

[11] However, the Court may have thought that the liabilities imposed on unions by §303 and the rights conferred by §§7, 8, 9 and 10 must be regarded as a single package, see Note, The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet, 69 Yale L. J. 498, 518-519 (1960).

vessels are engaged in the foreign commerce of the United States, they are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed, for the purpose here at issue, by Honduras' interests.

Although the application of the Jones Act to accidents on foreign registered vessels involves the probability of rules of liability and amounts of recovery different from the law of the flag, as the discussions in *Lauritzen*, 345 U. S. at 575-576 and in *Romero*, 358 U. S. at 358, show, imposition of United States law on the rights of a seaman to recover against a ship owner or operator for personal injury is not likely to involve either party in a breach of contract with a third person or in the violation of a foreign governmental requirement. The occasional application of the antitrust laws to activities abroad has not been without its problems, see *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.*, [1952] 2 All E. R. 780, 782, 784; *United States* v. *Holophane Co.*, 352 U. S. 903 (1956), even though the activity is usually of relatively small significance to the total economy of the foreign land. Here, on the allegations of the complaint, the conflict between United States and Honduran law would be constant;[12] far from dealing only with incidents while the ships were in American waters, the Board would be regularly applying the shifting standards of its own decisions, and those of American courts and American legislators, to conduct in Honduras, where the bargaining between Empresa and its employees has always taken place;[13] it would be endeavoring

[12] See the discussion in 69 Yale L. J. 498, 514-515 (1960).

[13] A wryly amusing illustration is furnished by the Board's explanation, in its opinion in this very case, fn. 23, that the existing collective bargaining agreement between Empresa and Marineros " is not a bar to this proceeding, assuming it would otherwise be so effective, because the decision herein is issuing after the expiration date of that contract. See: St. Louis Independent Packing Company, 122 NLRB 887, 889." One wonders how fully the Labor Court of Honduras is informed about the NLRB's "contract-bar" rule.

to enforce its will on matters that Honduras, with a better claim, regards as for itself to decide. Compare *Vanity Fair Mills* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633, 646-647 (2 Cir.), cert. denied, 352 U. S. 871 (1956). The situation here differs sharply from the United States' informing itself as to contracts relating to the movement of traffic between the United States and a foreign country, *Kerr SS. Co.* v. *United States*, 284 F. 2d 61 (2 Cir. 1960); *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F. 2d 147, 153 (D. C. Cir. 1961), or even taking action with respect thereto, *Thomsen* v. *Cayser*, 243 U. S. 66 (1917). The case is appropriate for application of Mr. Justice Jackson's warning that "in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our laws to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction," 345 U. S. at 582. We realize that if the Labor Act is inapplicable, owners of foreign flag ships such as Empresa will be deprived of the protection against certain unfair labor practices by the Federal courts accorded employers subject to the Act by such provisions as §10(1) and §303; but the practical consequences of this are less serious than those of a contrary holding. At least so the owners think, with the apparent concurrence of the Supreme Court in *Benz*.

Our belief that the Labor Act should not be held applicable in a case such as this is reinforced by the Geneva Convention on the High Seas, ratified by the United States on March 24, 1961, but not yet effective for lack of required ratification by 22 nations. Article 5, §1, of the Convention reads:

> "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships

> have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

Discussion seems to have been centered on what happens if the "genuine link" does not exist;[14] neither the text nor such explanatory materials as we have found say specifically what happens if the conditions of the final sentence are met. Yet, since it was deemed so important to insist upon the existence of a "genuine link" and the flag state's effective exercise of "jurisdiction and control in administrative, technical and social matters over ships flying its flag," it would be unreasonable to conclude that when all this had been done other states do not owe some obligations of respect.[15]

Three other matters ought be mentioned before we conclude:

(1) We have not discussed the conflicting contentions as to the effect of Article 22 of the Treaty with Honduras, quoted in footnote 4—plaintiff arguing that application of the Labor Act would violate the first clause, particularly

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[14] The "genuine link" requirement as adopted was less stringent than proposals made by such governments as the United Kingdom and the Netherlands and by the International Labor Conference, "which would have enabled states other than the flag state to withhold recognition of the national character of a ship if they considered that there was no 'genuine link' between the state and the ship." Report of the Committee on Foreign Relations to the Senate, 106 Cong. Rec. 10382 (1960). The Senate was told that the effect of the language as adopted in Geneva is that "no state can claim the right to determine unilaterally that no genuine link exists between a ship and the flag state," but "Nevertheless, there is a possibility that a state, with respect to a particular ship, may assert before an agreed tribunal, such as the International Court of Justice, that no genuine link exists. In such event, it would be for the Court to decide whether or not a genuine link existed." *Id.*

[15] Although the Geneva Convention has not yet become effective, a convention representing such a consensus of thought by the leading maritime nations should be given weight by a United States court as evidence of international practice, especially after ratification by this country.

in the light of the Supreme Court's statement in *Marine Cooks* quoted above, and defendant contending that the matter is one of "the execution of contracts" as to which the final sentence permits the application of "local laws." The problem is not an easy one; the view we take of the instant case makes it unnecessary for us to decide it.

(2) We realize that American unions understandably desire to organize vessels which they conceive to be in substance a part of this country's merchant marine, and that attempts to implement that desire can lead to a breach of the industrial peace which the Board is bound to promote, particularly when, as here, the stockholder of the foreign flag ships operates American flag vessels as well. Last summer's strike of the American merchant marine, with which we have some familiarity, see *United States* v. *National Marine Engineers Beneficial Assn.*, 294 F. 2d 385 (2 Cir. 1961), sufficiently demonstrates this. Therefore, we recognize that a controversy between an American union and Empresa could lead or tend to lead "to a labor dispute burdening or obstructing commerce or the free flow of commerce" carried on by American flag ships, as well as directly obstructing commerce carried on by foreign ones. However, that scarcely is decisive—the question still is how far Congress intended to permit the Board to intervene in what would normally be the affairs of a foreign government in order to prevent this. Even if we were to make the unrealistic assumption that Congress was so far-seeing as not only to have contemplated the growth of flags of convenience when it adopted the Labor Act in 1935,[16] but

[16] The use of "flags of convenience" by United States' enterprises is said to have begun in an effort to make what had been American ships available for the transportation of needed cargoes to powers resisting Nazi aggression despite the Neutrality Act of 1939, 54 Stat. 4, 6 Benedict, Admiralty (1958), 219-220; Note, Pan-Lib-Hon Registration of American-Owned Merchant Ships: Governmental Policy and the Problem of the Courts, 60 Colum. L. Rev. 711, fn. 1 (1960). It has continued for economic reasons. See Note, The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet, 69 Yale L. J. 198 (1960). The letter of the Secretary of Defense attached to the Attorney General's brief to the NLRB indicated that, as of 27 September 1960, the deadweight tanker tonnage available to the United States under "Panlibhon" (Panama, Liberia, Honduras) registry was some 120%, and the general cargo tonnage some 40% of the United States flag tonnage.

also to have anticipated cases where an American company would operate some ships under our own flag and others through foreign subsidiaries flying the flags of other countries, we see no basis for believing Congress would have chosen to solve the problem by an exercise of jurisdiction which would create such a conflict with a foreign government as would seem inevitable here. Mr. Justice Clark's statement in *Benz*, 353 U. S. at 147, seems exceedingly apposite:

> "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the faculties necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain."[17]

(3) In order to avoid any possible misunderstanding in this controversial area, we emphasize that we are deciding only the case before us; what the result should be when the contacts of the country of the flag are weaker relative to those of the United States than here, we do not say.[18]

The order denying a temporary injunction is reversed.

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[17] The Secretary of Labor has announced the creation of a three-man review board to study the flag of convenience controversy, N. Y. Times, Sept. 20, 1961, p. 47, col. 6.

[18] The Board decisions include *West India Fruit and Steamship Co., Inc.*, 130 NLRB No. 46, an unfair labor practice case now pending, on petition to review, in the Fifth Circuit; *Peninsular & Occidental SS. Co.*, 132 NLRB No. 1, also an unfair labor practice case; *Eastern Shipping Corp.*, 132 NLRB No. 72, and *Hamilton Bros., Inc.*, 133 NLRB No. 85, both representation cases. *Navios Corp.* v. *National Maritime Union*, 402 Pa. 325, 166 A. 2d 625 (1960), cert. denied, 366 U. S. 905 (1961), and *Incres Steamship Co., Ltd.* v. *International Maritime Workers Union*, 10 N. Y. 2d 218, 219 N. Y. S. 2d 21, cert. granted, —— U. S. —— (1961), involved the applicability of state laws with respect to picketing, as against claims of federal preemption.

APPENDIX D.

Opinion of District Court for Southern District of New York.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EMPRESA HONDURENA DE VAPORES, S. A.,
Plaintiff,
against
IVAN C. MCLEOD, Regional Director for the Second Region of the NATIONAL LABOR RELATIONS BOARD,
Defendant.

61 Civil 4413

PALMIERI, J.

This is a motion[1] for a preliminary injunction restraining defendant[2] from carrying out an order of the National Labor Relations Board (Board) directing a representation election among the unlicensed seamen employees of

[1] The motion was brought by an order to show cause submitted Wednesday and returnable late in the afternoon of the Thursday preceding the Sunday on which the election was scheduled to commence, thus giving the adverse parties little time in which to respond and forcing the Court to decide the complex questions of jurisdiction and injunctive relief under pressure of severe time limitations. Considering that the Board issued its order on November 17, 1961, and the plaintiff knew elections were scheduled to commence within 30 days thereof, this long delay in bringing the motion is unfortunate, particularly since the time was found to prepare printed motion papers.

[2] Only the Regional Director of the Second Region of the National Labor Relations Board is named as a defendant. It is clear that his responsibilities entail only the mechanics of executing the Board's direction of election. Whether fully effective relief requires the Court's order to reach the Board itself, and whether the members of the Board are indispensable parties to the action, are questions unnecessary to determine, in view of what follows.

Empresa Hondurena de Vapores, S. A. (Empresa). A complaint seeking permanent injunctive relief was filed simultaneously with the motion papers.

The election has been ordered to commence on December 17, 1961, on vessels owned or operated by plaintiff upon their arrival in United States ports and by mailing ballots to employees not aboard vessels scheduled to arrive in the United States between December 17, 1961 and January 31, 1962. Plaintiff is a Honduras corporation, operating vessels registered under the laws of Honduras and carrying the Honduran flag. The unlicensed seamen employed by plaintiff are, with the exception of one who is a citizen of Jamaica, all citizens of Honduras and, with the exception of four, all residents of Honduras. All are also members of a Honduran labor union, Sociedad Nacional de Marineros de Honduras,[3] which is certified by the Ministry of Labor of Honduras. Empresa is, however, a wholly owned subsidiary of United Fruit Company (United Fruit), a New Jersey corporation with its principal place of business at Boston, Massachusetts. Since the formation of Empresa it has, with few possible exceptions, chartered all its vessels to United Fruit which uses them, for the most part, to carry produce of United Fruit's Latin American operations. It is the plaintiff's position that the Board, in making the order here in question, exceeded its powers under the Labor Management Relations Act of 1947, 29 U. S. C. Chapter 7, inasmuch as this Act has been held by the Supreme Court of the United States[4] to be inapplicable to labor relations between nationals of foreign countries operating vessels

[3] This union did not permit its name to be placed on the ballot. Another Honduras union, Sindicato Maritimo Nacional de Honduras, "Sindimar", the National Maritime Union of America, AFL-CIO, and "no union", are the three choices offered by the proposed ballot.

[4] *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957); *cf. Marine Cooks & Stewards* v. *Panama S. S. Co.*, 362 U. S. 365 (1960); *Afran Transport Company* v. *National Maritime Union*, 169 F. Supp. 416 (1958); *Bobolakis* v. *Compania Panamena Maritima San Gerassimo*, 168 F. Supp. 236, 238 (1958).

under foreign laws and their foreign workers. The plaintiff urges, in addition, that the Board's direction that the representation election be held, presents a substantial Constitutional question; that such action is in contravention of treaty obligations with the Republic of Honduras and therefore violative of Article VI of the Constitution.[5]

THE JURISDICTION OF THIS COURT TO GRANT THE RELIEF REQUESTED BY THE PLAINTIFF.

At the very outset, it is necessary to consider the Board's objection that this Court lacks jurisdiction over the subject matter of this action. The objection is based upon the proposition that an employer is not entitled to invoke the jurisdiction of a federal district court to review the Board's direction of a representation election because an adequate and exclusive statutory method of obtaining judicial review by the appropriate Court of Appeals has been provided.[6]

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[5] Article VI of the Constitution provides, in pertinent part, as follows:

> "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . ."

Assuming there is a conflict between the Board's action, properly exercised pursuant to the Labor Management Relations Act of 1947, and the Treaty of Friendship, Commerce, etc. between the United States and Honduras, dated December 7, 1927, 45 Stat. 2618 (1927), an interesting legal question is posed. It does not follow, however, that Congress' Constitutional powers are diminished by the prior treaty commitments of the United States. Since neither has intrinsic superiority over the other, the later Congressional enactment should prevail. *Leges Posteriores priores contrarias abrogant* see *Edye* v. *Robertson* (Head Money Cases), 112 U. S. 580, 598-599 (1884); *Taylor* v. *Morton*, 23 Fed. Cas. No. 13,799 (1855); *cf. Cook* v. *United States*, 288 U. S. 102 (1933).

[6] 49 Stat. 454 (1935) as amended, 29 U. S. C. §160 (e), (f) (1952) provides that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals where the unfair labor practice in question was alleged to have been engaged in." This is the only provision for judicial review in the Act. The procedure for review of certification proceedings is set forth in §9 (d) providing that whenever an order of the Board is made pursuant to an unfair labor practices hearing and there is a petition for enforcement or review of the order by the court of appeals, the Board's certification is to be included in the transcript, and the validity of the whole representation determination is then open to judicial examination.

The plaintiff, on the other hand, relies on the frequently cited and much discussed decisions in *Leedom* v. *Kyne*, 358 U. S. 184 (1958); and *Fay* v. *Douds*, 172 F. 2d 720 (2d Cir. 1949).

On the one hand there can be no doubt that the Labor Management Relations Act of 1947 manifested a clear Congressional recognition that to achieve the statute's basic policy of promoting collective bargaining dilatory litigation had to be avoided; that a restriction of the scope and method of review of labor determinations tended to achieve this result; and that such restriction tended to promote the efficient functioning of the Board as well.[7] Thus, it has come to be generally recognized that Board determinations in representation proceedings are not reviewable by district courts under their general equity jurisdiction.[8] But this generally settled rule is subject to two exceptions—those established by the two decisions upon which the plaintiff relies. The nature of these exceptions and their impact upon the general rule were succinctly explained by Judge Friendly in a recent opinion, *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127, 129-130 (2d Cir. 1960):

> "Subsquently, two exceptions to this general rule excluding District Court jurisdiction to enjoin Board directions in representation matters have been recognized. The first was this Court's decision in *Fay* v. *Douds*, 2 Cir., 1949, 172 F. 2d 720, 723, relating to cases where the plaintiff advances a claim of denial

[7] See the Legislative History of the Labor Management Relations Act, 1947. (G. P. O. 1948); *Leedom* v. *Kyne*, 358 U. S. 185, 191-194 (1958); *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 405-411 (1940); *Fitzgerard* v. *Douds*, 167 F. 2d 714, 716-717 (2d Cir. 1948).

[8] *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127 (2d Cir. 1960); *McLeod* v. *Local 476*, 288 F. 2d 198 (2d Cir. 1961); *Leedom* v. *International Brotherhood of Electrical Workers*, 278 F. 2d 237 (D. C. Cir. 1960); *National Biscuit Division* v. *Leedom*, 265 F. 2d 101 (D. C. Cir. 1959), *Arb. denied*, 359 U. S. 1011 (1959).

> of constitutional rights, in that case lack of procedural due process, which is 'not transparently frivolous.' Thereafter a second exception was announced, first by the Court of Appeals of the District of Columbia and later by the Supreme Court, in *Leedom* v. *Kyne*, 1957 101 U. S. App. D. C. 398, 249 F. 2d 490, 1958, 358 U. S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210, where the Board had acted in direct and in that case conceded contravention of a specific mandate of §9, there §9 (b) (1)."

Since there is no claim here of the Board's violation of any statutory mandate, the *Leedom* v. *Kyne* exception does not apply. But there is present in this case the assertion of the deprivation of several Constitutional rights. Only one need be referred to since it is plainly one which is "not transparently frivolous."[9] It is urged not only by the plaintiff, but by the Attorney General of the United States when he intervened before the Board in these proceedings as *amicus*. At page 11 of his brief he stated:

> "A refusal to treat merchant vessels flying the flag of Liberia and Honduras as vessels of those nations would be in direct conflict with our treaty obligations and would, as the Under Secretary of State has pointed out in his letter of October 27, 1960, to the Attorney General, a copy of which is included as Appendix A, create serious difficulties in our foreign relations not only with nations signatory to these treaties but with other nations, such as Panama, which would be entitled to interpret a refusal to recognize the flag of the ship as a violation of the

[9] This language is that of Judge Learned Hand, writing for the unanimous Court in *Fay* v. *Douds* 172 F. 2d 720, 723 (2d Cir. 1949):

> "If this assertion of constitutional right is not transparently frivolous, it gave the District Court jurisdiction; and, having so acquired jurisdiction, the court might, and should, dispose of all other questions which arose, even though they would not have been independently justiciable."

> rules of international law upon which there had been mutual reliance."

Moreover, the Attorney General appended to his brief a communication from the Department of State signed by Under Secretary Douglas Dillon, dated October 27, 1960, expressing the Department's interest in these proceedings "based upon the important foreign relations considerations involved" and added, in part, as follows (p. 24 of Attorney General's brief):

> "The Department of State believes that a proper reading of these Treaties requires that vessels under the flag of Liberia and Honduras and carrying the papers required by the national laws of these countries in proof of nationality, be recognized by the United States Government or any agency thereof as having the nationality of those countries. Therefore, the Department considers that any action by the Board purporting to consider such vessels as United States flag vessels, would be subject to a charge of violation of the above international agreements."

I cannot go so far as to say that a treaty violation may occur. It would seem sufficient, on the jurisdictional aspect of this case, to point out the formal assertions of important officials of the executive branch of the Government which tend to substantiate the plaintiff's claim on this point. I conclude therefore that there is present in this case one of the two grounds set forth by Judge Friendly permitting the assertion of jurisdiction by the District Court.

The Plaintiff's Entitlement to Injunctive Relief.

Assuming the valid assertion of jurisdiction by the District Court, I shall now deal with the considerations affect-

ing the disposition of plaintiff's request that it be granted threshold injunctive relief. At the outset, I am not convinced of the probability of the plaintiff's success in sustaining the legal contentions of this case. I am constrained to note that although the Attorney General intervened before the Board, he has been silent before this Court. It may be, as the Board urges, that the Attorney General believes that resort to the Court is, in any event, premature because the election sought to be enjoined is an interlocutory step in a representation proceeding, and it may lead nowhere if neither union wins. It is only if one of the two unions on the ballot wins, and is certified by the Board as the collective bargaining representative that plaintiff will be placed under a legal obligation to bargain. And even in this contingency, the legal obligation is not enforceable until reviewed by the appropriate Court of Appeals as already stated. The plaintiff's assertions of immediate and irreparable damage by the holding of the election, without more, are unproved and unconvincing. It is not possible, on the record before me, to conclude that the plaintiff will suffer irreparable harm solely as a consequence of the holding of the election. I feel constrained to conclude that the interests of the many parties involved, particularly in the light of the lengthy and painstaking inquiry by the Board, do not justify the grant of the drastic threshold sanction invoked by the plaintiff.

Accordingly, the plaintiff's motion for a preliminary injunction is denied. It is so ordered.

EDMUND L. PALMIERI
U. S. D. J.

Dated: New York, N. Y.
December 16, 1961

APPENDIX E.

Decision and Direction of Election of NLRB and Dissenting Opinion.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

UNITED FRUIT COMPANY *and* NATIONAL MARITIME UNION OF AMERICA AFL-CIO	Case No. 2-RC-10379 Corrected Decision Pursuant to Order Dated 11/30/61

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Jacob Lazarus, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case,[1] the Board finds:

[1]On May 31, 1960, the Board held a consolidated hearing for purposes of oral argument in *West India Fruit and Steamship Company Inc.*, 130 NLRB No. 40; *Peninsular & Occidental Steamship Company*, 132 NLRB No. 2, and *Eastern Shipping Corporation*, 132 NLRB No. 72; on certain issues concerning the jurisdiction of the Act over ships flying the flags of nations other than the United States and concerning policy considerations involved in the Board's assertion of jurisdiction over such vessels. Similar issues are raised in this proceeding. Thus, as it appeared that United Fruit Company, the Petitioner, and Sociedad Naccional De Marinos Honduras, a Honduran organization, might have a substantial interest in the outcome of the *West India* and other cases referred to above, they were invited to participate as *amicus curiae* in the oral argument. Only the Petitioner accepted the invitation and appeared by counsel at the hearing. See, *West India Fruit and Steamship Company*, *supra*, pp. 1-2, footnote 5.

As set forth in our decision in the *West India* case, *supra*, p. 2, fn. 4, the Attorney General of the United States was permitted to intervene in this and the other three cases referred to above and in his brief, filed on November 18, 1960, presented on behalf of the Department of State and Department of Defense certain considerations of international law and national defense policy bearing upon issues common to the four cases.

Decision and Direction of Election of NLRB and Dissenting Opinion.

1. The Petitioner seeks a single fleet-wide unit of all unlicensed seamen employed aboard certain Honduran flag vessels which it alleges are beneficially owned and controlled by the United Fruit Company; here called UFCO, through its wholly owned foreign subsidiaries, Empresa Hondurena de Vapores, S. A.[2] and Balboa Shipping Corporation. UFCO contends that it is not, as alleged, the employer of the seamen involved and neither owns nor, as a time-charterer, operates the ships covered by the petition. Both UFCO and Empresa argue basically that as Empresa is a foreign corporation, is the employer of the seamen, and is engaged in its own business of operating and chartering the vessels, and as the vessels are of Honduran registry and the seamen of foreign nationality, the maritime operations involved are not within the jurisdiction of the Labor Act. Thus, the issue raised here concerns not only the effect upon the Act's jurisdiction of the foreign aspects adhering to Empresa's maritime operations, but also a determination of the relationship of Empresa and its operations to UFCO and its shipping trade.

As for the companies' arguments based upon the flag law and other international law doctrine and upon certain treaties and conventions between the United States and Honduras, such matters were dealt with at length in the Board's decision in *West India*. It was there concluded that the presence of such matters does not necessarily preclude the Act's coverage of a given maritime operation.[3] Similarly in the *Peninsular and Occidental*[4] and in the *Eastern Ship-*

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[2] Empresa Hondurena de Vapores, a Honduran Corporation, moved to intervene on the ground that it was the employer of the employees covered by the petition. Empresa was, without opposition, permitted to intervene at the hearing and has participated fully at all stages of this proceeding.

134 NLRB No. 25.

[3] The treaty and counsular conventions with Honduras are substantially the same as those with Liberia considered in the *West India* decision at pp. 19-21.

[4] 132 NLRB No. 1, at 5.

ping[5] cases it was held that the foreign incorporation of the legal owner and operator of a vessel and apparent employer of its crew did not alone take the vessel beyond the reach of the Act's jurisdiction.

However, none of these cases supports the proposition, in effect urged upon us here by the Petitioner, that underlying stock or other beneficial ownership and, thus, ultimate control of a foreign corporation and its operations by domestic United States interests necessarily bring the foreign corporation or its operation within the coverage of the Act. We do not read the Act as necessarily following United States investments abroad. It is the commerce of this nation, not of foreign nations, with which the Act is concerned. Also we are aware that international seaborne commerce will by its very nature involve insofar as this nation is concerned trade or transportation between foreign nations and a State. Nothing in the Act or relevant cases suggests, however, that all seaborne commerce reaching our ports on regular runs or sporadically is within the Act's coverage irrespective of other aspects of the operations.[6] In following the Supreme Court's *Lauritzen* decision,[7] the Board has pointed out that the test of jurisdiction given commerce literally within Section 2(6) is whether there exist substantial contacts between the "foreign" maritime operation and important United States interests.[8] Rather the problem is one of evaluating the many aspects of the operation and determining whether or not the shipping involved is essentially that of this nation and not that of a foreign nation which the exigencies of international trade

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[5] 132 NLRB No. 72, at 5-6.

[6] See, *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957); also *Lauritzen* v. *Larsen*, 345 U. S. 571, 581 (1952).

[7] *Lauritzen* v. *Larsen*, *supra*.

[8] E.g., *West India*, *supra*, p. 15; *Eastern Shipping Corporation*, *supra*, at 2.

[9] *West India*, *supra*, 15; *Eastern Shipping Corporation*, *supra*, p. 6.

have brought in contact with the United States.[10] Such a view clearly lends itself to the result that a foreign maritime operation can retain its essentially foreign nature and remain the commerce of a foreign nation outside the coverage of the Act despite underlying United States interests and certain commercial contacts with this country. At the same time, this view looks beyond the formal foreign aspects to determine if the maritime operation is in fact one primarily based in and operating out of the United States or essentially an adjunct of a domestic corporation's operations in the international trade of the United States; and, thus, is the shipping of this nation and, consequently, covered by the Act. It follows, as we emphasized in our *West India* decision (at pages 21 and 31) and as we reemphasize here, that the particular flag or nationality of the vessels involved, as such, plays no role in our determinations. Whether the flag or nationality be from our own hemisphere or across the seas, the controlling criteria are the same.

It is in the light of these considerations that we must approach the facts and issues before us in deciding the jurisdictional question. UFCO is a New Jersey corporation with its principal place of business at Boston, Massachusetts. Of its approximately 8.7 million outstanding shares of stock, over 8.5 million are owned by citizens of the United States. Its business interests extend world-wide and involve a rather diverse group of activities. However, it is primarily concerned with the raising of bananas, sugar, cacao and other tropical produce and with their transportation to market and sale. The bulk of its trade is between Central and South American locations and United States ports, and the value of its imports into this country exceed one million dollars annually, and are carried in large part

[10] Thus, in both the *Eastern Shipping* case at p. 5 and in *Hamilton Bros.*, 133 NLRB No. 85, p. 3, the Board noted in finding the Act applied that the U. S. contacts present were not just the result of the foreign seaborne trade of a truly foreign venture.

on ships either owned or chartered by UFCO, including those subject of the present petition.

Though it is an operating company, UFCO also to a large extent carries out its operations through some fifty to sixty subsidiaries, many of which are foreign corporations such as Empresa, the subsidiary involved in this proceeding. The primary purpose of UFCO's operating through subsidiaries is to achieve, as its vice-president explained in his testimony, a decentralized control of the companies' many activities in which the subsidiaries, more or less specializing in particular types of undertakings, deal with the the day-to-day problems of their operations while over-all policy and development control resides in the parent company. The extent and nature of that control is the subject of sharp disagreement between the Petitioner and the companies. But the record shows that, though day-to-day operations are in fact handled by the subsidiaries themselves, long-range plans concerning expansion, contraction or other changes in the operation of subsidiaries are generally controlled by UFCO, and its decision with respect to such matters is based not so much upon the needs or advancement of the subsidiaries as independent corporations, but rather upon the needs and planned development of UFCO's overall business in the production, transportation and sale of tropical produce.

Empresa is, as noted, one of UFCO's wholly-owned subsidiaries. It was organized under the laws of Honduras in 1941 by UFCO which supplied the capital for the venture. Empresa's officers are elected by its directors who are in turn elected by the sole stockholder, UFCO. There are, however, no interlocking directors with, or officers common to, Empresa and its parent. Furthermore, Empresa maintains all its own records, holds real estate in its own name, and otherwise appears to function as a distinct corporate entity. It is engaged in the business of owning and operating vessels registered under the laws of Honduras.

However, it does not carry passengers or cargo on its own account. Rather, since its incorporation it has time chartered all its vessels and its income from its maritime operations, which exceeds $400,000 annually, is derived wholly from the charter fees. But Empresa does not, as the record shows, hold itself out to the shipping world generally as being engaged in the business of chartering vessels. On the contrary, since its formation its business has been limited with but a few possible exceptions[11] to chartering its vessels to UFCO, and the seventeen ships under its control at the time of the hearing and which are the subject of the petition[12] were so chartered.

As the owner and operator of the vessels under time charter, Empresa must provide ships that are fully equipped and ready to put to sea. Thus, it is responsible not only for the physical condition of the ships[13] and for provisioning them,[14] except for fuel, but also for hiring the

[11] It was stated in the record by several Company witnesses that Empresa chartered its vessels to UFCO and no other company. However, an exhibit shows that certain of the vessels had, on relatively rare occasions, been under charter to companies unrelated to UFCO; but, whether Empresa itself had so chartered the vessels or whether they were in fact rechartered by UFCO to the stranger companies does not appear. In either event, it remains clear that Empresa does not look to the general shipping market but rather to UFCO for the chartering of its vessels.

[12] Empresa owned 14 of these vessels. Three were owned by Balboa Shipping Corporation, a Panamanian Corporation wholly owned by UFCO. Empresa is the managing agent of such vessels which, like its own ships, fly the Honduran flag. Balboa is not at this time directly involved with the operation of its three vessels which are, for all practical purposes, as fully under Empresa's control as are its own vessels. As Empresa's control over the vessels of Balboa appears to be the same as that over its own vessels, it is unnecessary for the purposes of this decision to distinguish between the two groups of vessels. We note, moreover, that it is not contended that jurisdiction over Balboa's vessels turns on factors other than those also applicable to Empresa and its vessels.

[13] Empresa is responsible not only for day-to-day upkeep of the vessels but also for having the ships drydocked and repaired. Both are usually done in the United States. However, betterments for vessels or the purchase and scrapping of vessels are matters usually falling within the over-all policy control of UFCO.

[14] Supplies are purchased both in foreign nations and the United States. Most of what it buys in this country is purchased from Maratrop Trading Corporation, a wholly owned UFCO subsidiary.

officers and crews[15] and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel.[16] There is nothing in the record to suggest that Empresa does not in fact carry out these typical responsibilities of the owner of a vessel under a time charter.

UFCO, as the time charterer of the vessels, determines what voyages they shall make, their ports of call, their length of stay in various ports, and what cargos they shall carry. In exercising its control, UFCO deals directly with the captain of the vessel involved. If it is dissatisfied with the handling of a vessel by its officers or crew or with its mechanical or other condition, it directs its complaints directly to Empresa, which is responsible for making any necessary changes. The ships are used for the most part, to carry produce of UFCO's Latin American operations,[17] and on any given trip may call at ports in various Central and South American countries including those of Honduras. As the bulk of the trade is between such countries and the United States, the vessels regularly call at the ports of this nation. On their return trips to Latin America the ships carry cargo for various UFCO subsidiaries and also general cargo for shippers and consignees outside the UFCO organization.

The record further shows that the Empresa vessels are wholly integrated in UFCO shipping operations. Thus, UFCO bareboat charters from one of its U. S. subsidiaries or owns outright a number of cargo ships registered under the laws of the United States. These ships, like Empresa's, are under the jurisdiction of UFCO's Marine Division, and

[15] The crews are hired in Honduras, are composed almost wholly of citizens of that country, and sign Honduran shipping articles.

[16] Empresa, as part of its control over personnel, has bargained with a Honduran organization as the representative of the crews of its vessels. See below, fn. 22.

[17] Some, if not all, of the ships also carry passengers.

the two groups of vessels are used interchangeably, carrying the same types of cargos and calling at the same ports, both domestic and foreign. In assigning a vessel to a particular run, the determination as to which vessel to use is based on its availability, size and speed, not on its ownership or flag.

The facts, outlined above, show that the maritime operations before us come literally within the Act's definition of commerce as they encompass in large part, transportation and trade between foreign countries and States of this nation. They further demonstrate that the relationship between UFCO and Empressa is one in which the affairs of the subsidiary are designed essentially to further the shipping operations of the parent and not one in which Empresa is considered an independent undertaking whose success or failure is gauged by its role in the open market. Supporting this conclusion are, *inter alia*, (1) that Empresa's capital expenditures and other substantial changes in operations are tied to UFCO's sea-going transportation needs, both present and projected, (2) that Empresa, with but few possible exceptions, time-charters its vessels to UFCO only and does not look to the open market for business, and (3) that Empresa's vessels are utilized by UFCO as an integral and necessary part of its fleet of vessels and not chartered as an alternative to acquiring vessels elsewhere or only to meet particular contingencies that may arise.[18] Thus, the record shows that Empresa's maritime operations are a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate

[18] In the situation where it or its subsidiaries' vessels cannot meet its needs, UFCO charters vessels from outside its family of companies. Also, it might be noted here that, in its annual reports, UFCO refers to the vessels involved in this proceeding as its own vessels and notes that certain vessels for foreign flag operations were built to its specifications, and so forth. There is nothing in such reports to indicate that UFCO considers the foreign flag vessels to be other than its own or to be otherwise than completely under its control.

ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation as described in Section 2(6) of the Act. It is also evident, and we find, that Empresa through its immediate authority and control over hiring and other terms and conditions of employment and UFCO through its control of Empresa and of the vessels and their operations are joint employers of the employees covered by the petition.[19]

We find, further, under the circumstances here that the maritime operations before us possess those substantial United States contacts which, under our decision in *West India*,[20] bring them within the jurisdictional coverage of the Act, despite the foreign registry of the vessels, Empresa's foreign incorporation, and the other foreign aspects present.[21] Accordingly, we conclude that Empresa and UFCO and their maritime operations subject of the petition are in, and affect, commerce within the meaning of Sections 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding. Thus, the companies' motions to dismiss on jurisdictional grounds are denied.

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[19] In so finding, we are not holding that a time charterer of a vessel is necessarily a joint employer of the vessel's crew irrespective of the other attendant facts.

As Balboa Shipping Corporation does not operate its three vessels time chartered to UFCO and does not hire or otherwise deal with the seamen on such vessels or affect their terms and conditions of employment and as Empressa has, as noted, authority over such matters, Balboa is not under the present arrangement an employer of the seamen on its vessels.

[20] 130 NLRB No. 46, pg. 14-15. Clearly, the United States contacts derive from the fact that the maritime operations involved are those of a domestic corporation. They are not the result of the international operations of a truly independent foreign maritime venture.

[21] See, also, *Peninsular & Occidental Steamship Co., supra; Eastern Shipping Corporation, supra;* and *Hamilton Bros., Inc., supra.*

2. The labor organizations involved claim to represent certain employees of the Employers.[22]

3. A question affecting commerce exists concerning the representation of certain employees of the Employers within Section 9(c)(1) and Section 2(6) and (7) of the Act.[23]

4. The following employees of the joint employers constitute a unit appropriate for the purposes of collective bargaining within Section 9(b) of the Act: all seamen employed upon the vessels owned or managed by Empresa Hondurena De Vapores, S. A., and jointly operated by the Employers, excluding guards, masters, other licensed officers, and all other supervisors.[24]

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[22] Following the close of the hearing in this case, Sindicato Maritimo Naccional De Honduras "Sindimar" sought to intervene in this proceeding on the basis of a card showing of interest. The Petitioner contends the request for intervention was not timely. We disagree, for the cards submitted in support of intervention were dated prior to the time of the close of the hearing. As we find that "Sindimar" is a labor organization, the motion to intervene is hereby granted. See, *Hamilton Bros. Inc.*, 133 NLRB No.

Sociedad Naccional De Marineros De Honduras was listed in the petition as the bargaining representative of the employees in the alleged appropriate unit and the record shows that, at the time of the hearing, a contract between Sociedad Naccional and Empresa covering the employees was then in effect. Copies of the petition, of the notice of hearing, and other formal papers were not served on Sociedad Naccional. However, on June 7, 1961, the Board issued a notice, served on the parties and Sociedad Naccional, in which, *inter alia*, it accorded that organization a right to intervene and state its position on the issues by filing within 25 days a "Statement of Intervention" and a brief. As Sociedad Naccional did not reply to the notice, we conclude it is not interested in being a party to this proceeding, and we therefore do not consider it to be one.

[23] We find contrary to the contention of Empresa that its contract with Sociedad Naccional in effect at the time the petition was filed but expiring in April 1961 is not a bar to this proceeding, assuming it would otherwise be so effective, because the decision herein is issuing after the expiration date of that contract. See: *St. Louis Independent Packing Company*, 122 NLRB 887, 889.

[24] The unit appears substantially as requested by the Petitioner. Empresa and UFCO did not contend the unit is inappropriate in either scope or composition, but object to the unit on the grounds considered above and found without merit, i.e. that UFCO is not an employer of the employees and that the Board is without jurisdiction in this case.

Decision and Direction of Election of NLRB and Dissenting Opinion.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by National Mari-

time Union of America, AFL-CIO; or by Sindicato Maritimo Naccional De Honduras, "Sindimar;" or by neither.

Dated: Washington, D. C.
November 15, 1961

FRANK W. McCULLOCH, Chairman

BOYD LEEDOM, Member

JOHN H. FANNING, Member

GERALD A. BROWN, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

PHILIP RAY RODGERS, MEMBER, dissenting:

For the reasons stated in my dissenting opinions in *West India Fruit and Steamship Company*, 130 NLRB No. 46, and *Hamilton Bros., Inc.*, 133 NLRB No. 85, I would dismiss the petition herein.

Dated: Washington, D. C.
November 15, 1961

PHILIP RAY RODGERS, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX F.

LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED

61 Stat. 136 (1947), 29 U. S. C. §§ 141-187

Section 152 [July 5, 1935, c. 372, §2, 49 Stat. 450; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, §101, 61 Stat. 137]:

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

EXHIBIT G

Complaint Without Exhibits.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EMPRESA HONDURENA DE VAPORES, S. A., Plaintiff, *against* IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board, Defendant.	COMPLAINT.

Plaintiff by its attorneys, White & Case, alleges upon information and belief:

1. The jurisdiction of this court is invoked under sections 1331 and 1337 of Title 28 of the United States Code.

The matter in controversy arises under the Constitution, the laws and a treaty of the United States hereinafter referred to and the matter in controversy exceeds the value of $10,000.00, exclusive of interest and costs.

2. Plaintiff is a corporation duly organized in 1941 under the laws of the Republic of Honduras, with its principal office and place of business at Puerto Cortes, Honduras. Its principal business is owning and/or operating 13 seagoing vessels which are registered under the laws of Honduras, fly the Honduran flag, are manned by unlicensed seamen employed in Honduras by plaintiff under Shipping Articles executed in Honduras. All but one of said seamen

are citizens of Honduras and he is a subject of Great Britain.

3. Defendant is the Regional Director for the Second Region of the National Labor Relations Board created by Congress under Article 1 section 8 of the Constitution of the United States.

Said Second Region includes the County of New York, within the Southern District of New York.

Said defendant is charged with the responsibility of carrying out the orders of the National Labor Relations Board, pursuant to the Labor Management Relations Act, Chapter 7 of Title 29 of the United States Code.

4. On November 15, 1961 the National Labor Relations Board (the "Board") rendered its Decision and Direction of Election in Case No. 2-RC-10739, United Fruit Company and National Maritime Union of America, AFL-CIO, in which proceeding the National Maritime Union of America, AFL-CIO, petitioned for an election among the unlicensed seamen employed on vessels owned and or operated by plaintiff and time chartered to United Fruit Company. Plaintiff intervened as a party on the ground that it was the sole employer of said seamen. Said Decision and Direction of Election directed an election by secret ballot to be conducted by defendant among said employees. A copy of this Decision and Direction of Election as corrected and amended by the Board is attached as Exhibit 1.

5. On or about November 22, 1961, plaintiff's attorneys received a communication dated November 21, 1961 from the office of defendant, copy of which is attached as exhibit 2, informing plaintiff that a pre-election conference was to be held at the office of the Board, Second Region, 745 Fifth Avenue, New York, N. Y., on December 1, 1961 relating to the conduct of the election.

Such pre-election conference held on December 1, 1961 was adjourned until December 11, 1961. On December 11, 1961 plaintiff was informed that defendant would issue a notice on December 12, 1961 of the dates and times and the manner of the conduct of the elections to be held pursuant to the order of the Board among said employees of plaintiff. Defendant informed plaintiff that the election is scheduled to take place on December 17, 1961 on board vessels owned and or operated by plaintiff upon their arrival in ports of the United States between December 17, 1961 and January 31, 1962 and by mailing ballots to said employees not aboard vessels scheduled to call at said United States ports between said dates.

6. Plaintiff is a wholly owned subsidiary of United Fruit Company, a New Jersey corporation. None of its officers or directors is employed by or associated with United Fruit Company and since its formation in 1941 all of its officers and directors have resided in Honduras.

7. Plaintiff owns ten of the seagoing vessels which it operates. It acts as agent for Balboa Shipping Company Inc., a Panamanian subsidiary of United Fruit Company, in the management and operation of three additional vessels which are owned by Balboa Shipping Company Inc. These thirteen vessels (the "Vessels") are presently time chartered to United Fruit Company and call at various ports in Central and South America, the United States, Canada and Europe. All of them call regularly at Honduran ports for trade and renewal of Ship's Articles.

8. The Vessels are registered under the Honduran flag. Plaintiff has never owned or operated American flag ships.

9. The Republic of Honduras has a long established and comprehensive system of laws and regulations governing all aspects of the ownership and operation of vessels

registered in Honduras and the employment of personnel thereon. Plaintiff is required to and does comply with these laws and regulations.

a. Each such vessel is required to carry on board a "Patente Definitiva de Navegacion" ("Patente") issued by the Republic of Honduras under signature of the Port Commandante of its home port (Puerto Cortes or Tela) evidencing ownership of said vessel. Such ownership is also inscribed in the Registry of Sea-going Vessels maintained by the Port Commandante.

Prior to the issuance of each Patente the owner must file in accordance with the requirements of the laws of the Republic of Honduras an application with the Republic of Honduras at Tegucigalpa enclosing with the application the bill of sale proving ownership of the vessel and must comply with certain other requirements under Title 2, Ley Organica de la Marina Mercante Nacional (1943).

b. Each such vessel is required to carry on board a safety equipment certificate issued by the Republic of Honduras, a navigation license, navigation log, crew roll, cash book, cargo book, compass log, tonnage certificate, load line certificate, charter party and a copy of the Commercial Code of Honduras and, if it carries radio equipment, the ship's station must be licensed by the Republic of Honduras and employ call letters and frequencies assigned by the Republic.

c. The officer personnel employed aboard such vessels must be licensed by the Honduran Government.

d. All unlicensed seamen in order to secure employment on such vessels of Honduran Registry are required to furnish a birth certificate, a Honduran passport, a Honduran seaman's identification book, the issuance of which is governed by Articles 56-64 of the Honduran Merchant Marine Act, a certificate of military inscription and a vaccination certificate. All unlicensed seamen are required to undergo

physical examination by a physician and must secure a medical certificate signed by this physician and a Honduran health official.

e. Each such seaman is required before he leaves Honduras to sign the Ship's Articles maintained in accordance with Article 24 of the Honduran Merchant Marine Act which lists the name of each seaman, his age, marital status, place of birth, nationality, domicile and name and address of next of kin. The Ship's Articles are certified by the Port Commandante in Honduras.

10. Plaintiff employs approximately 335 unlicensed seamen upon the Vessels. All but one of these unlicensed seamen are citizens of the Republic of Honduras. The one non-Honduran citizen is a Jamaican and a subject of Great Britain. With four possible exceptions, all of the unlicensed seamen are residents of the Republic of Honduras.

11. United Fruit Company has no employer relationship whatever with any employee of plaintiff including seamen employees. Plaintiff has the sole and exclusive authority and control over all matters concerning terms and conditions of employment including hiring, firing, wages and discipline of employees.

12. Since 1941 the unlicensed seamen employed by plaintiff have been represented by Sociedad Nacional de Marineros de Honduras, a Honduran labor union recognized by the Republic of Honduras, as their collective bargaining agent. Collective bargaining agreements have been entered into between plaintiff and this collective bargaining agent since 1942. The agreement now in effect is dated March 29, 1957. With certain adjustments as to wages and related matters, this contract has been in effect at all times since said date and has been renewed by its terms until February 15, 1963. A copy and translation are attached as Exhibit 3.

All of said unlicensed seamen are members of Sociedad (the Union) in accordance with paragraph 3 of said agreement.

13. Under Honduran law plaintiff is required to recognize the Union as the exclusive bargaining agent of its unlicensed seamen..

Labor grievances concerning the unlicensed seamen employed by plaintiff are handled by representatives of plaintiff and the Union, including referral of such grievances to the Public Solicitor of the Ministry of Labor, the Labor Courts and to the Minister of Labor of Honduras.

14. Furthermore, under the laws of Honduras, the petitioner in Case No. 2-RC-10739, National Maritime Union of America, AFL-CIO, (NMU) cannot gain recognition by the Honduran Government and could not lawfully represent plaintiff's said employees. Articles 490 and 504 of the Honduran Labor Code provide in translation as follows;

> "Article 490: No union may be permitted to act as such nor to exercise the functions prescribed to it by law or by its respective by-laws, nor to exercise its rights so long as it does not have recognition of its juridic personality, and may act as such only during the time it is so recognized.
>
> Article 504: "No union may function whose personnel is not composed of at least ninety per cent (90%) of Honduran citizens. No matter what is the form of direction of the union, no alien is eligible for directive posts."

NMU does not have Honduran recognition of its juridic personality nor are at least 90% of its personnel Honduran citizens.

15. Finally, plaintiff has received from the Government of Honduras an official ruling of its Ministry of Labor

to the effect that the action of the Board in this case, in assuming jurisdiction over the plaintiff and its unlicensed seamen and in directing the election, is a violation of the sovereignty of the Republic of Honduras and null and void under its law. A translation of the said ruling is attached as Exhibit 4.

16. The Board had no jurisdiction to direct defendant to conduct an election among said employees of plaintiff and in so directing acted in excess of its powers. The Supreme Court of the United States held in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), that the Labor Management Relations Act of 1947 (Chapter 7, Title 29 of the United States Code) does not apply to labor relations between nationals of foreign countries operating vessels under foreign laws and their foreign workers.

17. In its Decision and Direction of Election the Board acted in violation of the Constitution of the United States.

a. Such action violates Article VI of the Constitution in contravening the provisions of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras dated December 7, 1927, 45 Stat. 2618 (1927). Article 16 of this treaty provides:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessel of the Party whose flag is flown."

b. Such action is in disregard of the principles of international law recognized and adhered to by the Depart-

ment of State and violates Article II, section 2 of the Constitution by infringing upon the functions and powers granted to the Executive Department of the United States Government to conduct the foreign affairs of the United States.

c. Such action violates Article I, section 8 of the Constitution by exceeding powers granted to Congress thereunder, and

d. Such action violates Amendment V to the Constitution by depriving plaintiff of its "liberty, or property, without due process of law", in that it deprives plaintiff, a citizen of the Republic of Honduras, of its liberty to contract and, furthermore, impairs its rights under the existing collective bargaining agreement with the Union.

18. Plaintiff will suffer immediate and irreparable damage unless defendant, his agents, servants, employees, attorneys and all persons acting for and in concert with him are enjoined from conducting an election among the seamen employees of plaintiff in the following respects, among others:

a. Plaintiff will be denied the protection and rights granted to it under the laws and Constitution of the United States;

b. Plaintiff will be caused to violate its existing collective bargaining agreement with the Union and may be subjected to damages and other sanctions as a consequence thereof;

c. Plaintiff will be caused to violate the Honduran law requiring it to recognize the Union as the exclusive bargaining agent of plaintiff's seamen employees and may thereby be subjected to penalties and other sanctions under Honduran law; and

d. The operation of the Vessels will be impaired and plaintiff's relations with its seamen employees seriously

disturbed and disrupted, all to plaintiff's loss and economic disadvantage.

19. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays judgment permanently enjoining the defendant, his agents, servants, employees, attorneys and all persons acting in concert with him from carrying out the Board's aforesaid Decision and Direction of Election dated November 15, 1961 and from conducting an election among plaintiff's said employees and granting such other and further relief as may be just and proper.

And plaintiff prays that an order be made temporarily enjoining during the pendency of this action the carrying out of the aforesaid Decision and Direction of Election and the holding of an election thereunder.

Dated: December 12, 1961

WHITE & CASE

By ORISON S. MARDEN
A Member of the Firm.
Attorneys for Plaintiff,
14 Wall Street,
New York 5, N. Y.

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No. [redacted]

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

FRANK W. MCCULLOCH, CHAIRMAN, AND PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, AND GERALD A. BROWN, MEMBERS, NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D. C.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MORTON P. HOROWITZ,
Assistant General Counsel,

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Attorneys,
National Labor Relations Board,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No.

FRANK W. MCCULLOCH, CHAIRMAN, AND PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, AND GERALD A. BROWN, MEMBERS, NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the members of the National Labor Relations Board, petitions for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit before judgment, to review the final judgment entered by the United States District Court for the District of Columbia on March 6, 1962, enjoining the members of the Board from conducting a representation election among the seamen employed on certain foreign flag vessels beneficially owned and controlled by the United Fruit Company.

OPINIONS BELOW

The opinion of the district court (App., *infra*, pp. 8-28) is reported at 201 F. Supp. 82. The Board's Decision and Direction of Election are reported at 134 NLRB No. 25, and are set forth at pp. 58-70 of the petition for certiorari in *McLeod* v. *Empresa*, No. 858, this Term.

JURISDICTION

The final judgment of the district court was entered on March 6, 1962 (App., *infra*, pp. 32-33), and an appeal therefrom was docketed in the court of appeals on April 9, 1962 (App., *infra*, p. 34). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Act extends to seagoing vessels which—

(1) are beneficially owned by, and operated under control of, an American corporation,

(2) are engaged almost exclusively in regular sailings in foreign commerce between the United States and Latin American ports,

(3) fly the flag of a foreign nation,

(4) carry a foreign crew, and

(5) have substantial and significant contacts with both the United States and the foreign nation.

STATUTES INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 29 U.S.C. 151, *et seq.*), and of the other relevant statutes and treaties, are set forth at pp. 14-19 of the petition for certiorari in *McLeod* v. *Empresa*, No. 858, this Term.

STATEMENT

As more fully set forth in the petition for certiorari in *McLeod* v. *Empresa*, No. 858, this Term, the National Maritime Union of America, AFL-CIO ("NMU") filed a petition for a representation election with the Board seeking certification as the representative of unlicensed foreign seamen employed aboard certain Honduran flag vessels owned by Empresa Hondurena de Vapores, S.A. ("Empresa"), a Honduran corporation which is wholly owned and controlled by United Fruit Company ("UFCO"), an American corporation. UFCO and Empresa contested the Board's jurisdiction, asserting that the Act did not apply to ships flying the flag of a foreign nation.

On November 17, 1961, the Board issued its Decision and Direction of Election (Petition in No. 858, pp. 58-70). The Board found that "Empresa's maritime operations are a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation * * *." Apply-

ing the principles laid down in its earlier decision in *West India Fruit and Steamship Company*, 130 NLRB 343,[1] the Board concluded that the maritime operations involved "possess those substantial United States contacts which * * * bring them within the jurisdictional coverage of the Act, despite the foreign registry of the vessels, Empresa's foreign incorporation, and other foreign aspects present * * *." (Petition in No. 858, p. 67.) The Board ordered that an election be conducted among the employees of the UFCO-Empresa vessels to determine whether they wished to be represented by the NMU, by Sindicato (a Honduran union which had intervened in the proceeding), or by no union (*Id.*, pp. 69-70).

On December 12, 1961, Empresa filed suit against the Regional Director of the Board, in the District Court for the Southern District of New York, to enjoin the scheduled election. On December 16, 1961, the District Court denied a temporary injunction. But, on January 12, 1962, the Court of Appeals for the Second Circuit reversed, ruling that a temporary injunction should issue. The Second Circuit held that the National Labor Relations Act did not apply to the vessels involved, because, on the facts here, the vessels' contacts with the flag country, Honduras, were substantial, and either equaled or outweighed those of the United States. (Petition in

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[1] In *West India*, the Board held that the question of whether it has jurisdiction over foreign flag vessels operating in the commerce of the United States is to be determined on the basis of the extent of the contacts which the particular vessels have with the United States.

No. 858, pp. 6-9.) The Board's Regional Director and the NMU, which had intervened in the suit, have filed petitions for certiorari to review this decision, Nos. 858 and 862, this Term.

While the *Empresa* case was pending in the federal courts in New York, Sociedad, the Honduran union which presently represents the seamen involved, brought the instant suit in the United States District Court for the District of Columbia against the members of the National Labor Relations Board, to enjoin them from conducting the same election. On December 16, 1961, a temporary restraining order was issued (App., *infra*, p. 9). On January 18, 1962, after hearing, the District Court granted a preliminary injunction and denied the Board's motion to dismiss the complaint. (App., *infra*, pp. 28-31.) The Court held that "the Labor Management Relations Act of 1947, should be construed as not conferring any authority or power on the National Labor Relations Board to conduct elections for collective bargaining purposes among foreign seamen manning vessels flying a foreign flag, and employed under contracts executed in a foreign country pursuant to foreign law" (App., *infra*, p. 28). Thereafter, cross-motions for summary judgment were filed, and the District Court granted judgment for Sociedad and made the injunction permanent (App., *infra*, pp. 32-33). The Board appealed this judgment to the Court of Appeals, and, after the appeal was docketed therein, filed the instant petition for certiorari (App., *infra*, p. 34).

REASONS FOR GRANTING THE WRIT

This case involves the same decision directing an NLRB election that is the subject of two other petitions for certiorari already pending before this Court. It presents the identical question raised by those petitions, *i.e.*, whether, and to what extent, the National Labor Relations Act may be applied to vessels flying foreign flags which are substantially engaged in the commerce of this nation. *McLeod* v. *Empresa Hondurena de Vapores, S.A.*, No. 858, this Term, filed April 10, 1962;[2] *National Maritime Union* v. *Empresa Hondurena de Vapores, S.A.*, No. 862, this Term, filed April 11, 1962. Moreover, this is the same basic issue that is involved in *Incres Steamship Company, Ltd.* v. *International Maritime Workers Union*, No. 469, this Term, certiorari granted, December 4, 1961, 368 U.S. 924.

We have shown in the petition in No. 858 that prompt and definitive guidance on the question of the Board's jurisdiction over foreign flag vessels is a matter of great public importance, and that, in considering that question, it would be desirable for the Court to consider the facts in No. 858 together with *Incres*. Since the instant case involves the same Board proceeding and decision involved in No. 858 and would be

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[2] In this case, in which a *union* sought to enjoin the Board from conducting an election, there is not present the jurisdictional issue in No. 858 (which we are not pressing in that case) whether, in a suit by an *employer*, a district court has jurisdiction to issue such an injunction. See the petition in No. 858, note 14, p. 13.

controlled by the decision in No. 858, it would be appropriate for this Court to review directly the decision of the district court in the instant case, in advance of judgment by the court of appeals, at the same time as it reviews the decision of the Second Circuit in No. 858.[3]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted together with the petition in No. 858, and both cases should be set down for argument with *Incres Steamship Company, supra*, No. 469, this Term, certiorari granted, 368 U.S. 924.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

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National Labor Relations Board.

MAY 1962

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[3] See *The Three Friends*, 166 U.S. 1, 49; *Forsyth* v. *Hammond*, 166 U.S. 506, 511-513; *Johnson* v. *Fleet Corporation*, 280 U.S. 320, 324-325; *Porter* v. *Dicken*, 328 U.S. 252; and cases cited in Robertson and Kirkham, *Jurisdiction of the Supreme Court* (Wolfson and Kurland 1951 ed.) § 131.

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4020-61

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, PLAINTIFF

v.

FRANK W. MCCULLOCH, Chairman, and PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, and GERALD A. BROWN, Members, NATIONAL LABOR RELATIONS BOARD, DEFENDANTS

OPINION

Herzel H. E. Plaine, Charles S. Rhyne and Brice W. Rhyne, all of Washington, D. C., for the plaintiff.

Stuart Rothman, General Counsel; Marcel Mallet-Prevost and Norton J. Come, Assistants General Counsel, for the National Labor Relations Board, of Washington, D. C. for the defendants.

H. Howard Ostrin, of New York, for intervenor National Maritime Union of America, AFL-CIO.

The question presented in this case is whether the National Labor Relations Board has authority to order that an election for the designation of representatives for the purposes of collective bargaining, be held among foreign seamen employed on foreign mer-

chant ships that have occasion to visit American ports and that are owned by a foreign corporation that is a subsidiary of an American corporation.

The National Labor Relations Board, on November 15, 1961, rendered a decision and issued a direction that an election be conducted among seamen employed on certain vessels flying the flag of Honduras and owned by a Honduran corporation, the name of which is Empresa Hondurena de Vapores, S. A., generally known as Empresa, and which is a subsidiary of the United Fruit Company, an American corporation. The purpose of the election was to determine whether these seamen desired to be represented for purposes of collective bargaining by the National Maritime Union of America AFL-CIO, or by a Honduran labor union briefly known as "Sindimar", or by neither. The plaintiff, Sociedad Nacional de Marineros de Honduras, is a Honduran labor union and the bargaining agent of these seamen under the laws of Honduras. The name of the plaintiff was not to be placed on the ballot at the prospective election.

On December 16, 1961 the plaintiff brought this action against the members of the Board to enjoin and restrain them from conducting the election on the ground that in ordering it, the Board had exceeded its legal authority. A temporary restraining order was issued on the same day. A hearing was held on December 20, 1961. The National Maritime Union of America, AFL-CIO, was granted leave to intervene as a defendant, since it had been a party to the proceeding before the Board. A motion for a preliminary injunction and a motion by defendants to dismiss the complaint for failure to state a claim upon which relief can be granted were heard at length. A decision on these two motions was reserved in order to accord to the Department of Justice an oppor-

tunity to submit a statement as to its attiude and as to the position of the Department of State concerning the matter.[1]

The pertinent facts may be summarized as follows. Empresa is a corporation organized under the laws of Honduras, where it maintains its principal office and place of business. It owns and operates a fleet of seagoing vessels, which are registered under the laws of Honduras and fly the flag of that country. The crews of these ships are composed entirely of citizens of Honduras, with the exception of one person, who is a British subject. All of the seamen are members of a Honduran labor union, which is the plaintiff in this action, and which is briefly known as Sociedad. They were hired in Honduras under shipping articles executed in that country. Sociedad is recognized by the Government of Honduras as the sole collective bargaining agent of these seamen. Collective bargaining agreements are in effect between Empresa and Sociedad. Empresa is a subsidiary of United Fruit Company, a New Jersey corporation. The ships in question make voyages and carry freight between Central and South American ports, as well as between Central and South American ports and ports of the United States.

On November 13, 1959, the National Maritime Union of America, AFL-CIO, filed a petition with the National Labor Relations Board, seeking to represent as a single unit all unlicensed seamen employed on ships owned by various subsidiaries of the United Fruit Company, including Empresa. Statutory au-

[1] The complaint is verified on oath and consequently is treated as an affidavit for the purpose of the motion for a preliminary injunction. No answering affidavits have been filed, although memoranda and briefs in opposition have been submitted.

thority for maintaining such a proceeding is found in 29 U.S.C. § 159(c). The Union claimed that it represented a number of these employees. It does not appear whether the activity of the American Union was instigated by any of the seamen, or whether the Union was interjecting itself on its own initiative.

A series of hearings were conducted before an Examiner and the matter was then considered by the Board. Two years later, on November 15, 1961, the Board rendered a decision, in effect, granting the prayer of the petition and ordering an election, as has already been stated. The comprehensive and exhaustive opinion of the Board was substantially predicated on the propositions that the flag or nationality of the vessels should play no role in its determination; that the ships were actually controlled by United Fruit Company as a charterer; that the bulk of the trade conducted by the ships was between Central and South American countries and the United States; and that, consequently, this shipping was essentially that of this nation, and an adjunct of the operations of a domestic corporation in international trade of the United States. It was contemplated that the balloting would take place in part on board each ship when it visited an American port, and in part by mail, i.e. "absentee voting".

Honorable Celeo Davila, Ambassador of Honduras, promptly submitted a formal written protest, dated November 29, 1961, against the decision of the Board, in which he courteously but firmly called attention to the fact that a treaty between Honduras and the United States, signed on November 7, 1927, provided that merchant vessels under the flag of either of the contracting parties, should be deemed to be the vessels of the party whose flag they fly, both within the territorial waters of the other party and on the high

seas. He also called attention to some of the other facts that have already been summarized and to certain principles of international law.

At the argument of the motions before this Court, a representative of the Department of Justice was present as an observer. The Court invited him to submit a statement of the views of the Government as to the merits of the Honduran note, and time was accorded for that purpose. Subsequently this Court received a formal communication from Honorable William H. Orrick, Jr., Assistant Attorney General, dated January 10, 1962, the pertinent portions of which read as follows:

> "The Department of State informs me that, although the Department does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case.
>
> "We are sending copies of this letter to the counsel of record."

Counsel for the National Labor Relations Board responded by a letter dated January 12, 1962, in which he took issue with the Department of Justice and the Department of State, and adhered to his original position that the Board had acted within the scope of its authority.

This disagreement between counsel for various agencies of the Government complicates the problem before the Court and requires more elaborate and exhaustive discussion than might otherwise be needed. The Attorney General, as the chief legal officer of the Government, through his representatives, indicates that the Department of State is of the opinion that the jurisdiction of the National Labor Relations Board should not attach in this case. It is a reason-

able inference that in transmitting the views of the Department of State, the Department of Justice was, in effect, approving or concurring in them. On the other hand, counsel for the National Labor Relations Board, which theoretically is also an agency of the Executive branch of the Government, strikes a dissonant note and seeks to uphold the jurisdiction of the Board. Ordinarily, the Attorney General, through members of his staff, or through the United States Attorney, appears in behalf of the Government. If there are any differences of opinion between Government agencies, they are generally adjusted intramurally, and the definitive position of the Government is presented to the Courts by the Attorney General through his representatives.[*]

The anomalous situation presented in the instant case gives rise to some reflections on an interesting and significant development that in recent years has gradually taken place in the fundamental political institutions of this country. It is, of course, elementary that the Founding Fathers contemplated a tripartite division of the Federal Government, consisting of three coordinate branches. Being both profound scholars and practical realists, they derived their ideas in part from political philosophers, principally Montesquieu, and in part from their own actual experience. The advent of the administrative process, which was almost unknown in Anglo-American jurisprudence at the time of the Constitutional Convention, but which has been necessitated by mod-

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[*] E.g. *St. Regis Paper Co. v. United States*, decided by the Supreme Court on December 11, 1961 (not yet reported). It is stated on page 8 of the slip opinion that the Solicitor General pointed out that the Government agencies were at loggerheads on the problem presented to the Court, but that he had concluded "on balance" to present a specific view.

ern social and economic developments, has affected this tripartite division. At times the administrative process is employed by Executive departments and agencies, such as the Department of the Interior, the Department of Agriculture, the Department of Health, Education and Welfare, and others. It is also applied by regulatory Boards and Commissions. Beginning with the Interstate Commerce Commission, which was created in 1887, the number of such establishments has greatly grown. This development was particularly rapid in the years immediately following the great depression.

It was at first assumed that these Boards and Commissions were included entirely within the Executive branch of the Government. The Supreme Court in *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629, however, held that to a considerable extent such regulatory bodies were independent of the Executive. Thus in order to secure their independence, members of such boards and commissions, unlike other appointees of the President, were not subject to removal by the President at will. Mr. Justice Sutherland in his learned and thoughtful treatment of this topic indicated that these agencies were in part quasi-legislative and in part quasi-judicial. It may well be that from the standpoint of political science and constitutional law, we are gradually evolving a Federal government divided into four coordinate branches, instead of three. This is not said in any critical vein, but merely in the interest of clarity of thought. It is entirely possible that the development will prove salutary. The law and political institutions cannot stand still or remain static.

The issue to be decided in this litigation, namely, the status of a merchant ship in a foreign port, lies

in a field that has frequently been discussed by the courts as well as by publicists and commentators. These discussions are not always consistent with each other and some of them are difficult to reconcile. For example, there are divergent statements as to whether a merchant ship is a part of the territory of the country whose flag it flies when it is in the territorial waters of a harbor of a foreign country.

In *United States* v. *Rodgers*, 150 U. S. 249, 260, it was stated that as concerns transactions on board merchant ships, the vessels "are deemed to be within the country of their owners. Constructively they constitute a part of the territory of the nation to which the owners belong."

In *United States* v. *Flores*, 289 U. S. 137, 155, Mr. Justice Stone observed that a merchant vessel is deemed to be a part of the territory of the sovereignty whose flag it flies for the purposes of jurisdiction to punish crimes committed on board ship. It does not lose that character when in navigable waters within the territorial limits of another sovereignty.

In *Lauritzen* v. *Larsen*, 345 U. S. 571, 584, Mr. Justice Jackson emphasized the importance of this doctrine in trenchant terms (pp. 584, 585):

> "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity

of a registration can be questioned only by the registering state.

"This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it 'is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty'."

On the other hand, expressions may be found to the effect that it is but a figure of speech to say that a merchant ship is part of the territory of the country whose flag it flies, even when the ship is in the territorial waters or a port of a foreign country.

The leading American decision on this general subject is *Wildenhus's Case*, 120 U. S. 1, in which the opinion was written by Mr. Chief Justice Waite. That case involved a homicide committed on board a Belgian merchant ship while it was moored at a dock in Jersey City. It was held in a *habeas corpus* proceeding that the local New Jersey courts had jurisdiction of the crime, although both the culprit and the victim were subjects of Belgium and members of the ship's crew. As some of the statements in the opinion are basic to the topic here discussed, we shall quote from it at some length (pp. 11, 12 and 18):

"It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement;

* * * * *

"From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and *the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves.*" And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquility of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdiction.

"Disorders which disturb only the peace of the ship or those on board are to be dealt with ex-

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Emphasis supplied.

> clusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction."

To summarize the basic theory, matters relating to the peace of the ship or those on board, are to be dealt with exclusively by the sovereign of the home of the ship, while disturbances of the peace generally may be suppressed and the offenders punished by the local authorities. While this doctrine relates to the enforcement of the criminal law, the same principles would seem to be applicable to civil affairs. Although the principle is clear, it is not always easy or simple to draw the line and to determine on which side any particular transaction may fall.

The converse of the situation presented in *Wildenhus's Case*, was confronted in two later decisions of the Supreme Court. In *Wildenhus's Case* a crime committed on board a foreign merchant ship in an American harbor, was deemed punishable by American courts if it disturbed the peace of this country. In *United States* v. *Rodgers*, 150 U.S. 249, and *United States* v. *Flores*, 289 U. S. 137, it was held that an American seaman committing a crime on board an American ship, while the ship was either in foreign territorial waters or in a foreign harbor, could be brought back to the United States and tried in a Federal court. The first of these two cases applied this doctrine to an assault with a dangerous weapon committed on board an American ship by an American seaman while the ship was proceeding through Detroit River, which was within the territorial waters of Canada. The second went so far as to sustain criminal jurisdiction of a Federal court over a murder of an American citizen by another American citizen

aboard an American ship while at anchor in a port in the Belgian Congo. This conclusion was reached in spite of the fact that at the time of the commission of the offense, the ship was attached to the shore by cables at a point two hundred and fifty miles inland from the mouth of the Congo River. Attention has been called to these few decisions in order to indicate the uncertainties of the subject and the vagueness of the limitations on the authority of the United States in respect to foreign merchant ships from the point of view of constitutional and international law, as well as from the standpoint of comity and policy.

It seems proper to commence a consideration of the specific problem that confronts the Court in this case with a reference to the treaty between the United States and Honduras "of Friendship, Commerce, and Consular Rights", signed on December 7, 1927, and proclaimed on July 23, 1928, 45 Stat. 2618. Article X of the treaty provides as follows (45 Stat. 2625):

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, . . . shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown."

Article XXII, 45 Stat. 2634, provides, in part, as follows:

> "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a

port within his consular district. *Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.*[4]

It may be emphasized that this treaty expressly reserved to the country under whose flag a ship sailed, jurisdiction over adjustment of seamen's wages and contracts relating thereto.

The pertinent statutory provisions that define the power and authority of the National Labor Relations Board are found in the Labor Management Relations Act of 1947, 29 U.S.C. §§ 141 *et seq.* In 29 U.S.C. § 159, it is provided that:

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rate of pay, wages, hours of employment, or other conditions of employment: . . ."
>
> * * * *
>
> "(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the

[4] Emphasis supplied.

representative defined in subsection (a) of this section, . . ."

* * * *

"the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

The terms "commerce" and "affecting commerce" are defined in 29 U.S.C. § 152, subsections (6) and (7), as follows:

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

The phraseology of the statute is sweeping and comprehensive. It contains no restrictions, limita-

tions, or exceptions. There are instances, however, in which a statute is not to be construed literally if such an interpretation would defeat the legislative intent. There are certain canons of statutory construction that serve as guides and aids in determining the intent of Congress and the meaning of statutes. These precepts must be considered and given appropriate weight depending upon the circumstances of each case.

First, if there are two possible constructions of a statute, one of which may give rise to a constitutional question while the other would not create such a problem, the latter should be preferred, *Crowell* v. *Benson*, 285 U.S. 22, 62; *I.C.C.* v. *Oregon-Washington Ry Co.*, 288 U. S. 14, 40. To be sure, in the case at bar the plaintiff does not raise any constitutional issue but relies solely on what it urges to be the proper construction of the statute,—else it necessarily would have applied for the convening of a three-judge statutory court. Nevertheless, such a question lurks in the background and its probable presence may well be weighed by the court in determining how the statute should be interpreted.

If at all possible, any construction of a statute that would be violative of the principles of international law should be avoided. Thus, Mr. Chief Justice Marshall had occasion to observe that, "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains", *The Charming Betsy*, 2 Cranch 64, 118.

An Act of Congress, no matter how universal the scope of its terms may be, will ordinarily be confined in its operation and effect to the territorial limits of the United States, unless the contrary intention is clearly and affirmatively expressed. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

357; *Sandberg* v. *McDonald*, 248 U. S. 185, 195; *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285; *Air Line Dispatchers Ass'n.* v. *National Mediation Board*, 189 F. 2d 685, 690; 89 U. S. App. D. C. 24.

Repeals by implication are not favored. In other words, a statute will not be construed to repeal by implication an earlier enactment if it is at all possible to reconcile both. *A fortiori* this principle applies when there is an apparent inconsistency between an Act of Congress and an earlier treaty. If at all feasible the Act of Congress will be so interpreted and applied as not to affect the provisions of the treaty. *Chew Heong* v. *United States*, 112 U. S. 536, 549; *Cook* v. *United States*, 288 U. S. 102, 121; *Pigeon River Co.* v. *Cox Co.*, 291 U. S. 138, 160. In the *Cook* case, *supra*, it was said that "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed".

The literal meaning of a statute may not be followed and applied in such a manner as to produce an absurd result or one that is unreasonable and plainly at variance with the policy of the legislation as a whole. To avoid such a consequence, the courts will at times imply limitations and exceptions in a statute that the legislative body has not inserted. Thus it was said in *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459:

> "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. . . . This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and

> yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, make it unreasonable to believe that the legislator intended to include the particular act."

Among the many cases holding to the same effect, are *United States v. Kirby*, 7 Wall. 482, 486, and *United States* v. *American Trucking Association*, 310 U. S. 534, 542. In the *Kirby* case, it was stated (pp. 486-487):

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

It may be helpful to consider the construction and application of other Acts of Congress to foreign merchant ships entering American ports. For example, it was held that an Act of Congress prohibiting the making of advances of wages to seamen, did not apply to a foreign ship with a foreign crew putting in at an American port, if the advances had been made outside of the United States. This result was reached in spite of the fact that the statute contained no such exception, *Sandberg* v. *McDonald*, 248 U. S. 185. On the other hand, a law entitling seamen to receive one-half of accrued wages in every port that the ship entered, was held applicable to foreign ships while in an American port in respect, however, only to wages that had accrued. *Strathearn SS Co. v. Dillon*, 252 U. S. 348. It will be observed that the last men-

tioned case involved an action required to be performed in the United States, while the former held the statute inapplicable to activities that took place abroad.

The National Prohibition Act was held applicable to foreign merchant ships while in American ports, *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100. The Government, however, did not attempt to prosecute personnel of such a ship for having intoxicating liquor on board, as perhaps a literal construction of the statute might have permitted. The Government merely insisted on requiring that such liquor be sealed while the ship was in an American port. This contention of the Government was approved by the Supreme Court.

The Eight Hour Law governing employment on Government contracts was held inapplicable to Government work performed in a foreign country, even though the statute used the terms "every contract" and included no exceptions, *Foley Bros.* v. *Filardo*, 336 U. S. 281.

The Jones Act governing the rights of seamen to recover damages for personal injuries incurred in the course of employment, was held inapplicable to a member of the crew of a foreign ship who was injured while in a foreign harbor, *Lauritzen* v. *Larsen*, 345 U. S. 571. Again, no express exception was included in the statute. In the course of his opinion, Mr. Justice Jackson stated (p. 582):

> "But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

The question whether the Labor Management Relations Act of 1947 applies to foreign vessels operated by foreign seamen shipped under foreign articles, while the vessel is temporarily in an American port, was answered in the negative in *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138. That case involved a ship that sailed into harbor at Portland, Oregon. It was flying a Liberian flag and was owned by a Panamanian corporation. The crew was made up entirely of nationals of foreign countries, who had signed a British form of articles of agreement at Bremen. While the ship was at anchor at Portland, members of the crew went on strike and picketed the vessel. They designated the Sailors' Union of the Pacific as their collective bargaining representative. The picketing was eventually stopped by an order of the court. An action for damages against the Union was filed by the owners of the vessel. The defendants urged that the trial court was without jurisdiction, on the ground that the Labor Management Relations Act had preempted the field. This contention was overruled and it was held that this statute was not applicable. The court indicated that it was not the purpose of Congress to resolve labor disputes between nationals of other countries operating ships under foreign laws (pp. 142, 143). The Court further stated that in order to construe this statute as applicable in such a delicate field of international relations there had to be present the affirmative intention of the Congress clearly expressed (p. 147).

This decision would seem to be dispositive of the issue presented in the case at bar, were it not for the contention advanced by counsel for the defendants and counsel for the intervenor that it was overruled, or at least limited, by the subsequent ruling of the Supreme Court in *Marine Cooks* v. *Panama S. S. Co.*,

362 U. S. 365. That case involved a Liberian ship manned by an alien crew, whose employment contracts had been executed outside of the United States. The ship put in at Tacoma, Washington, for the purpose of delivering cargo. Marine Cooks and Stewards, AFL, an American Labor union, picketed the vessel. Its owner brought suit for an injunction against this activity. It was held that the Court lacked the power to issue such an injunction because of the prohibitions of the Norris-LaGuardia Act, which precluded the granting of injunctions in labor disputes except under certain circumstances. Counsel argued that since the Norris-LaGuardia Act was applicable, the situation must have been deemed to involve a labor dispute within the meaning of the Labor Management Relations Act. This reasoning is, however, a *non sequitur*. There may indeed be labor disputes outside of the scope of that Act and beyond the jurisdiction of the National Labor Relations Board. The Court expressly referred to the *Benz* case and did not disapprove it or narrow it in any way.

Finally, reliance is placed on *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, in which it was held that the Fair Labor Standards Act covered employees of American contractors engaged in the construction of a military base for the United States in an area in Bermuda leased by Great Britain to the United States for ninety-nine years. The question determined by the Court, however, was solely whether the term "possession" as used in the Act to define its geographical coverage should be construed as comprising a base leased by the United States in a foreign territory for a long term. This question was answered in the affirmative as against a vigorous dissenting opinion written by Mr. Justice Jackson and in which three other members of the Court concurred. The case has no bearing on the problem confronted in this case.

This Court, therefore, reaches the conclusion that the Labor Management Relations Act of 1947, should be construed as not conferring any authority or power on the National Labor Relations Board to conduct elections for collective bargaining purposes among foreign seamen manning vessels flying a foreign flag, and employed under contracts executed in a foreign country pursuant to foreign law. The fact that the corporation that owns the ship may be a subsidiary of an American corporation does not affect this result. Consequently the Board was without power or authority to issue the order directing the election in this instance.

Accordingly, the plaintiff's motion for a preliminary injunction is granted and the defendants' motion to dismiss the complaint is denied. Counsel may submit an appropriate order.

This discussion would seem to lead to a final disposition of this litigation insofar as this Court is concerned. This is not possible, however, on the present state of the record, in view of the fact that the plaintiff has made no motion for summary judgment. No doubt this was due to the twenty-day limitation prescribed by Rule 56 of the Federal Rules of Civil Procedure, since the twenty-day period from the commencement of the action had not expired when the present motions were argued. As this period has now elapsed, the Court would entertain such a motion at this time.

s/ Alexander Holtzoff
United States District Judge.

January 18, 1962.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4020-61

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, PLAINTIFF

v.

FRANK W. McCULLOCH, Chairman, and PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, and GERALD A. BROWN, Members, NATIONAL LABOR RELATIONS BOARD, DEFENDANTS

ORDER GRANTING PRELIMINARY INJUNCTION AND DENYING DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

This cause came on to be heard on December 20, 1961, upon the motion of plaintiff for a preliminary injunction and other relief on the verified complaint, opposed by the defendants and by the intervener, National Maritime Union of America, AFL-CIO, and upon the motion of the defendants to dismiss the complaint. The Court has considered the facts and exhibits as verified under oath in the complaint, the arguments of counsel, and the briefs and memoranda of the parties, including the views of the Department of State submitted by the Department of Justice. Being fully advised in the matter, the Court delivered and filed a written opinion on January 18, 1962. The Court finds that:

In the case before the National Labor Relations Board (hereinafter the Board), described as Case No. 2-RC-10379, re *United Fruit Company and National Maritime Union of America, AFL-CIO*, the decision and direction of election rendered by the Board on

November 15, 1961, ordered the conduct of a representation election for collective bargaining purposes, under 29 USC sec. 159(c), among the Honduran and other foreign seamen, who are employed under contracts executed in Honduras under Honduran law, and who comprise the plaintiff Honduran union and crews that man the ships registered under the laws and flying the flag of Honduras and owned by the employer the Honduran corporation Empresa Hondurena de Vapores, S.A., which is a subsidiary of the United Fruit Company, an American corporation. The said order for an election exceeds the authority conferred upon the Board by the Labor Management Relations Act of 1947. Since the Board is without power or authority to issue the order directing the election in this case, it is

ORDERED, ADJUDGED, AND DECREED that, pending further order of the Court, the National Labor Relations Board, its members, officers, agents, employees and successors, and all other persons in active concert and participation with them, be and they hereby are restrained and enjoined from conducting an election for the designation of representatives for collective bargaining purposes among the foreign crewmen comprising the members of plaintiff union, Sociedad Nacional de Marineros de Honduras, who man the Honduran registered ships of Empresa Hondurena de Vapores, S.A.,

It is further ORDERED, ADJUDGED, AND DECREED, that the security in the amount of $500, filed with the Court on December 16, 1961 shall be continued in effect until the further order of the Court, conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

And it is further ORDERED, ADJUDGED, AND DECREED, that the motion of the defendants, the National Labor Relations Board, to dismiss the complaint, be and is hereby denied.

/s/ Alexander Holtzoff
ALEXANDER HOLTZOFF, Judge

Dated: January 22, 1962

Approved as to form:

/s/ Norton J. Come
Counsel for Defendants
National Labor Relations Board

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4020-61

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, PLAINTIFF

v.

FRANK W. MCCULLOCH, Chairman, and PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, and GERALD A. BROWN, Members, NATIONAL LABOR RELATIONS BOARD, DEFENDANTS

ORDER AND JUDGMENT—GRANTING MOTION FOR SUMMARY JUDGMENT, DENYING CROSS-MOTION FOR SUMMARY JUDGMENT, DENYING MOTION TO STRIKE, AND MAKING PRELIMINARY INJUNCTION PERMANENT.

1. This cause came on to be heard on March 5, 1962, on a motion for summary judgment by plaintiff filed January 23, 1962, a cross-motion for summary judgment by defendants filed January 31, 1962, and a motion by plaintiff filed February 2, 1962, to strike from the record of this case the record of the proceedings before the National Labor Relations Board.

2. The Court has considered the several motions and the arguments of counsel, and the Court's written opinion of January 18, 1962, which resulted in the order of January 22, 1962, granting plaintiff's motion for a preliminary injunction and denying defendants' motion to dismiss the complaint.

3. Accordingly, as a matter of law, the plaintiff is entitled to a summary judgment in its favor, and to an order making permanent the preliminary injunction heretofore issued against the National Labor

Relations Board and others therein specified; and defendants' cross-motion for summary judgment should be denied. Plaintiff's motion to strike alleged improper material from the record should be denied.

Wherefore, it is ORDERED, ADJUDGED AND DECREED that:

A. The Motion of plaintiff for a summary judgment in its favor is granted.

B. The cross-motion of defendants for summary judgment in their favor is denied.

C. The motion of plaintiff to strike material from the record is denied.

D. The preliminary injunction, heretofore granted and issued by this Court on January 22, 1962, be and the same hereby is made perpetual and permanent, and the defendants, the National Labor Relations Board, its members, officers, agents, employees and successors, and all other persons in active concert and participation with them, be and they hereby are perpetually and permanently restrained and enjoined from conducting an election for the designation of representatives for collective bargaining purposes among the foreign crewmen comprising the members of plaintiff union, Sociedad Nacional de Marineros de Honduras, who man the Honduran registered ships of Empresa Hondurena de Vapores, S.A.

/s/ Alexander Holtzoff
ALEXANDER HOLTZOFF, Judge

Dated: March 6, 1962

Approved as to form:

/s/ Norton J. Come
Counsel for Defendants
National Labor Relations Board

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT
Washington 1, D.C.

Joseph W. Stewart
Clerk

April 10, 1962

A-12-18-61

No. 16,965 McCulloch, etc et al., v. Sociedad Nacional etc., et al

Dear Sir:

In the above-entitled case the record was filed in this court, on April 9, 1962

* * * *

Very truly yours,

JOSEPH W. STEWART, Clerk

Marcel Mallet-Prevost, Esq.
National Labor Relations Board

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FILED
MAY 10 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1961

NOS. [illegible] AND [illegible]

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board,

Petitioner,

against

EMPRESA HONDURENA DE VAPORES, S.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

No. 858—O. T. 1961

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

against

EMPRESA HONDURENA DE VAPORES, S.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

No. 862—O. T. 1961

RESPONDENT'S BRIEF IN CONNECTION WITH PETITIONS FOR CERTIORARI.

ORISON S. MARDEN,
Attorney for Respondent,
14 Wall Street,
New York 5, New York.

CHESTER BORDEAU,
WILLIAM D. CONWELL,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1961.

NOS. 858 AND 862.

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board,
Petitioner,
against
EMPRESA HONDURENA DE VAPORES, S.A.,
Respondent.
On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

No. 858—O. T. 1961

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,
against
EMPRESA HONDURENA DE VAPORES, S.A.,
Respondent.
On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

No. 862—O. T. 1961

RESPONDENT'S BRIEF IN CONNECTION WITH PETITIONS FOR CERTIORARI AND APPENDIX.

Respondent submits that the decision of the United States Court of Appeals for the Second Circuit is in all respects correct and is fully supported by the decisions of this Court in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957) and in *Marine Cooks* v. *Panama SS. Co.*, 362 U. S. 365 (1960).

Further, the position of the United States as heretofore expressed in this case and in the proceedings before the National Labor Relations Board which gave rise to this case, is in consonance with the opinion of the Court of Appeals.

However, respondent does not object to the granting of the petitions; but if granted, the following two questions are those which should be presented for review in lieu of the questions suggested by petitioners.

Questions Presented.

I.

Whether the Labor Management Relations Act, 1947 (29 U. S. C. §§141, et seq.) extends to the organizational and collective bargaining activities of unlicensed seamen:

(a) who are all Honduran citizens except one, a Jamaican citizen;

(b) who are employed in the Republic of Honduras, under shipping articles executed in Honduras, by a Honduran corporation whose stock is owned by an American corporation;

(c) who man seagoing vessels, owned by the Honduran corporation, which are engaged almost exclusively in regular sailings in foreign commerce between the United States and Honduras and other Latin American ports and which fly the flag of, and are registered in, the Republic of Honduras and are time chartered to the American corporation; and

(d) who are represented by a Honduran labor union which is the exclusive bargaining representative of these seamen under Honduran law.

The question is not, as suggested by petitioner McLeod, whether the Act extends to seagoing vessels. The Act does not purport to extend jurisdiction to "seagoing vessels".

It extends to employees within the contemplation of the Act and the protection of their organizational and collective bargaining activities (29 U. S. C. §§141, *et seq.*).

Nor does the record in this case concerning the terms and conditions of employment, including the payment of wages and discipline of personnel, show (as erroneously stated in the questions presented by the petitioners) that the seagoing vessels are operated under the control of an American corporation. Indeed, the Board in its findings stated (pages 43a, 44a of appendix to petition of National Maritime Union):

> "As the owner and operator of the vessels under time charter, Empresa [respondent] must provide ships that are fully equipped and ready to put to sea. Thus, it is responsible not only for the physical condition of the ships and for provisioning them, except for fuel, but also for hiring the officers and crews, and handling all matters concerning terms and conditions of employment, including payment of wages and discipline of the personnel. There is nothing in the record to suggest that Empresa does not, in fact, carry out these typical responsibilities of the owner of a vessel under a time charter."

II.

Whether the action of the National Labor Relations Board in directing the representation election among respondent's unlicensed seamen violates the provisions of the Constitution of the United States as follows:

> *a. by contravening the provisions of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras dated December 7, 1927, 45 Stat. 2618 (1927) in violation of Article VI of the Constitution.*

b. by infringing upon the functions and powers of the Department of State of the United States in conducting the foreign affairs of the United States in violation of section 2 of Article II of the Constitution.

c. by exceeding the powers granted to Congress under section 8 of Article I of the Constitution.

d. by depriving respondent of its "liberty, or property, without due process of law" in that respondent, a citizen of the Republic of Honduras, would be deprived of its liberty to contract and, furthermore, would be deprived of its rights under an existing collective bargaining agreement with a Honduran union, the exclusive bargaining agent of the aforesaid seamen under Honduran law, in violation of Amendment V to the Constitution.

The questions presented by petitioner, National Maritime Union of America, AFL-CIO, are inappropriate and should not be presented for review.

The Position Heretofore Taken by the United States.

On December 15, 1961, the Department of State of the United States, through its Legal Advisor, forwarded to the Honorable Edmund L. Palmieri, before whom the motion for a temporary injunction had been heard, a Note dated October 29, 1961 from the Ambassador of Honduras protesting the Board's Decision and Direction of Election, as in violation of Articles 10 and 22 of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras, dated December 7, 1927 (45 Stat. 2618), as infringing upon the sovereignty of Honduras and upon established principles of international law. A copy of this Note was before the United States Court of Appeals for the Second Circuit,

together with a copy of a letter dated January 10, 1962, from the United States Department of Justice to the District Court for the District of Columbia stating that although the Department of State:

> "does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case."

The original of this letter dated January 10, 1962 from the Department of Justice was delivered to the District Court for the District of Columbia where Sociedad Nacional de Marineros de Honduras (collective bargaining agent for respondent's unlicensed seamen) had brought an action to restrain the members of the Board from conducting the same representation election involved in this case. Summary judgment granting a permanent injunction was entered by Judge Holtzoff and a petition for certiorari in that case has been filed with this Court by the Board.

In the proceeding before the National Labor Relations Board which gave rise to this action (Case No. 2-RC-10379), the United States, intervenor as *amicus*, filed a brief with the Board at the request of the Department of State and the Department of Defense. The Under Secretary of State by letter to the Attorney General dated October 26, 1960, a copy of which is attached to that brief, requested

> "the Department of Justice to intervene in these proceedings to present to the National Labor Relations Board the views of the Department of State upon certain significant matters of maritime and international law present in these proceedings."

The Secretary of Defense by letter to the Attorney General dated October 27, 1960, a copy of which is also attached to

that brief, requested the Department of Justice to submit to the Board certain defense policy considerations.

In its brief, the Department of Justice on behalf of the United States made the following pertinent points, among others:

1. Congress did not intend the Labor Management Relations Act to govern the internal labor relations of a foreign ship and its foreign crew.

2. The flag of a ship determines its nationality and the nation with jurisdiction over its internal economy.

3. Treaties of the United States with other nations require recognition of the nationality of a vessel by its flag.

4. If a corporation organized under the laws of a foreign nation owns or operates a foreign flag vessel, manned by a foreign crew, its identity as a foreign vessel seems established, although the holders of stock in the corporation may be American in whole or in part.

Present Status of Case.

In the case at bar, the mandate of the United States Court of Appeals for the Second Circuit was made the order of the United States District Court for the Southern District of New York by order dated February 15, 1962, granting the motion of respondent for a preliminary injunction and denying petitioner's motion for dismissal of the complaint. A copy of that order is annexed hereto.

Conclusion.

If either petition is granted, the questions to be reviewed should be those presented herein, in lieu of the questions suggested by petitioners.

Respectfully submitted,

ORISON S. MARDEN,
Attorney for Respondent.

CHESTER BORDEAU,
WILLIAM D. CONWELL,
Of Counsel.

Dated: New York, N. Y.
May 9, 1962.

APPENDIX.

Order Dated February 15, 1962.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EMPRESA HONDURENA DE VAPORES, S. A.,
Plaintiff,
against
IVAN C. MCLEOD, Regional Director for the Second Region of the National Labor Relations Board,
Defendant.

61 Civil 4413.
Order.

A motion having been made by plaintiff for an order providing that the mandate of the United States Court of Appeals for the Second Circuit, consisting of the opinion of the Honorable Henry J. Friendly, Circuit Judge, concurred in by the Honorable J. Edward Lumbard, Chief Judge, and Thurgood Marshall, Circuit Judge, and the order of reversal of the United States Court of Appeals for the Second Circuit dated January 12, 1962, filed with the Clerk of this court on January 30, 1962, be made the order of this court and providing for the injunctive relief requested by plaintiff in the order to show cause dated December 12, 1961, and providing for the denial of the motion made by defendant for a dismissal of the action, and on motion of White & Case, attorneys for plaintiff, it is

1. ORDERED, that the mandate of the United States Court of Appeals for the Second Circuit, filed with the Clerk of the United States District Court for the Southern District of New York on January 30, 1962, is hereby made the order of this court;

2. ORDERED, that pending the trial and adjudication of the issues raised by the complaint herein, the defendant, Ivan C. McLeod, Regional Director for the Second Region of the National Labor Relations Board, and all persons acting for or in concert or in participation with him who receive actual notice of this order by personal service or otherwise; are hereby enjoined from conducting a representation election among plaintiff's unlicensed seamen until the final hearing and determination of this action, and it is further

3. ORDERED, that security in the amount of $500 be furnished by plaintiff conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, and it is further

4. ORDERED, that the motion of defendant to dismiss the complaint be, and the same hereby is, denied.

Dated: New York, New York
February 15th, 1962

EDMUND L. PALMIERI,
United States District Judge.

2/21/62
O. K.
H. A. C.

A True Copy
HERBERT A. CHARLISON, Clerk
By ELSIE M. EILE
Deputy Clerk

Office-Supreme Court, U.S.
FILED
MAY 29 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 942

FRANK W. McCULLOCH, CHAIRMAN, AND PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, AND GERALD A. BROWN, MEMBERS, NATIONAL LABOR RELATIONS BOARD, *Petitioners,*

against

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 996

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, *Petitioner,*

against

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN REPLY TO PETITIONS FOR CERTIORARI

CHARLES S. RHYNE,
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RHYNE & RHYNE,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

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against

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL., *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

RESPONDENT'S BRIEF IN REPLY TO PETITIONS FOR CERTIORARI

Counter Statement of the Case

The statements of this case presented by both Petitioners are deficient. Respondent believes that the Court should be informed of the following pertinent facts.

Empresa Hondurena de Vapores, S. A. (hereinafter referred to as Empresa) is a corporation organized under the laws of Honduras with its principal place of business in Honduras. It owns and operates a fleet of sea-going vessels which are registered under the laws of Honduras and fly the Honduran flag. The unlicensed personnel on board these vessels are composed entirely of Honduran citizens with the exception of one seaman who is a Jamaican citizen. All of the seamen are members of the Honduran Labor Union, Sociedad Nacional de Marineros de Honduras, which is the Respondent in this action. These seamen were hired in Honduras under Shipping Articles executed in Honduras. The Government of Honduras recognizes Respondent Union as the sole collective bargaining agent of the seamen, and a collective bargaining agreement to this effect, is in force between Empresa and Respondent. The ships in question make voyages and carry freight between Central and South American ports, as well as between Central and South American ports and ports of Canada, the United States and Europe.

The National Labor Relations Board (hereinafter referred to as NLRB) on November 15, 1961, rendered a decision pursuant to a petition of the National Maritime Union of America, AFL-CIO (hereinafter referred to as NMU) directing that an election be conducted by the Board among the seamen employed by Empresa to determine whether the seamen desired to be represented for purposes of collective bargaining by the NMU or by "Sindimar," another Honduran Labor Union or by neither.

Following the NLRB's decision, the Honorable Celeo Davila, Ambassador of Honduras, on behalf of the Government of Honduras, promptly submitted to our State Department a formal written protest dated November 29, 1961, in which he objected to the decision on the ground that a treaty between Honduras and the United States provides that mer-

chant vessels under the flag of either of the contracting parties should be deemed to be the vessels of the party whose flag they fly, both within the territorial waters of the other party and on the high seas, and that therefore the Board's decision violated Honduran sovereignty. (For full text of this note see Exhibit 4 to the Complaint.)

On December 16, 1961, Respondent Union brought this action against the members of the National Labor Relations Board in the United States District Court for the District of Columbia to enjoin and restrain them from conducting the election on the ground that, in ordering the election, the NLRB had exceeded its legal authority. A temporary restraining order was issued on the same day. On December 20, 1961, a hearing was held on a motion for preliminary injunction and a motion by the Petitioners to dismiss the complaint for failure to state a claim upon which relief can be granted. Prior to decision on the motions, and pursuant to an invitation of the Court, the Department of Justice submitted a memorandum on January 10, 1962, to the Court which stated in part as follows:

> "The Department of State informs me that, although the Department does not support all of the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case."

The District Court found that the case of *Benz v. Compania Naviera Hidalgo, S. A.*, 353 U.S. 138 was dispositive of the issue that the Labor Management Relations Act, 1947 (29 U.S.C. 141, et seq.) should be construed as not conferring any authority or power on the NLRB to conduct elections for collective bargaining purposes among foreign seamen, manning vessels flying a foreign flag, and employed under contracts executed in a foreign country pursuant to foreign law. The District Court went on to say that the

fact that the stock of the corporation that owns the vessels may be owned by an American corporation does not affect this result.

Thereafter, the District Court granted judgment for Respondent Union and made the injunction permanent. The members of the NLRB appealed this judgment to the United States Court of Appeals for the District of Columbia and after the Appeal was docketed therein, filed the instant petition.

The Treaties Involved

The Treaty of Friendship, Commerce and Consular Rights, dated December 7, 1927, 45 stat. 2618, between the United States of America and the Republic of Honduras contains the following pertinent provisions:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties .... shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown." (Article X, 45 Stat. 2625)

> "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit." (Article XII, 45 Stat. 2634)

Respondent's Position

It is the position of Respondent Union that the decision of the United States District Court for the District of Columbia is correct in every respect and that it is fully supported by the decisions of this Court in *Benz v. Compania Naviera Hidalgo, S. A.*, *supra*, and in *Marine Cooks v. Panama S.S. Company*, 362 U.S. 365. This decision is further supported by the provisions of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras; the position of the Republic of Honduras as expressed in the letter of the Ambassador referred to *supra*, p. 2; and the position of the United States of America as expressed in this case both in the Brief Amicus it filed before the NLRB, *infra*, pp. 8-9, in the proceedings which gave rise to this action, and in its Memorandum to the District Court, *supra*, p. 3.

However, regardless of the foregoing, Respondent does not interpose objections to the granting of certiorari. If the Court grants certiorari, Respondent respectfully suggests that the appropriate questions to be presented and considered are as set forth below.

Questions Presented

The questions presented in this case are whether the NLRB has authority to order that an election for the designation of representatives for purposes of collective bargaining be held among Honduran seamen:

1. Who are already members of and represented by Respondent, a Honduran Union, which is the exclusive bargaining representative of these seamen under Honduran law.

2. Who are all citizens of Honduras except one who is a citizen of Jamaica.

3. Who are employed under a Honduran collective bargaining contract and articles of agreement executed in Honduras.

4. Who work on Honduran registered merchant vessels flying the Honduran flag, owned by a Honduran Corporation the stock of which is owned by an American Corporation, which vessels are time chartered to an American Corporation, and which carry freight between Central and South American ports and between Central and South American ports and ports of Canada, the United States and Europe.

In connection with the foregoing, the Court should also consider the following questions:

1. Whether or not the action of the NLRB which has been enjoined by the District Court:

a. Was unconstitutional because it violated the Treaty of Friendship Commerce and Consular Rights between the United States and Honduras and therefore is contrary to Article 6 of the United States Constitution which declares that treaties under the authority of the United States shall be part of the supreme law of the land;

b. Violated international law and the law of nations recognized by the Constitution of the United States as being a part of the law of the land, by disregarding the universally accepted maxim that laws of the state of registry govern exclusively a ship's internal affairs;

c. Illegally encroached upon the functions and powers of the Department of State of the United States in conducting the foreign affairs of the United States in violation of Section 2 of Article II of the Constitution;

d. Violated Section 8 of Article I of the Constitution by exceeding its jurisdiction under the National Labor Relations Act, since Congress is without power to entrust the NLRB with such authority;

e. Violated the Fifth Amendment to the Constitution by depriving Respondent of its liberty or property without due process of law, in that Respondent, a Honduran union, would be deprived of its liberty to contract, and furthermore, would be deprived of its rights under an existing collective bargaining contract with a Honduran corporation.

The questions presented by petitioners NLRB and NMU are inaccurate and should not be reviewed by this Court.

The Position of the Republic of Honduras

A very clear and concise explanation of the official position of the Republic of Honduras is stated in the Note of September 29, 1961, *supra*, p. 2, from the Ambassador of Honduras to The Secretary of State. That Note states in part as follows:

"My Government has taken notice of this decision (by the NLRB) with very great concern, because the Board has paid no consideration to the fact that all those vessels fly the Honduran flag and are registered in the Honduras registry, and has also ignored the Treaty of Friendship, Commerce and Consular Rights between Honduras and the United States, signed at Tegucigalpa, Honduras, on December 7, 1927. . . .

"I want to inform your Excellency the Secretary of State that according to the Labor Law of Honduras 'Codigo de Trabajo de Honduras', Honduras has exclusive jurisdiction over the relations of employers and employees working in its territory and in its ships flying its flag. This jurisdiction cannot be renounced

and the Honduras Government can never accept that a foreign Union like the National Maritime Union of America or any other represent the seamen of Honduras that work on vessels of Honduran flag. According to our Labor Laws those seamen are represented by a Honduras Union properly established in that country and regulated by the National Labor Laws. . . ."

The Position of The United States

The Position of the Government of the United States as presented to the District Court in the memorandum of January 10, 1962, referred to *supra* p. 3, is further shown by reference to the Government's position before the NLRB in the preceeding which gave rise to this action. For example, in the Brief Amicus, filed by the Department of Justice on behalf of the United States, and at the request of the Department of State and the Department of Defense, with the NLRB (November, 1960 in cases 15-CA-1454, 12-CA-255, 12-RC-415, 2-RC-10379) the Department of Justice stated that a refusal to treat merchant vessels flying the flag of Honduras as Honduran vessels:

> "would be in direct conflict with our treaty obligations, and would . . . create serious difficulties in our foreign relations not only with nations signatory to these treaties but with other nations, such as Panama, which would be entitled to interpret a refusal to recognize the flag of the ship as a violation of the rules of international law upon which there had been mutual reliance." (Brief Amicus, p. 11, *supra*, p. 5)

Under the facts in this case, the Department went on to point out that to extend the Labor Management Relations Act to ships flying the flag of Honduras:

> "would have far-reaching effects upon the internal economy of the ships, would displace the labor relations

policies of the flag states as well as labor unions organized under their laws and would prejudice the foreign relations of the United States with these independent nations. In such event, the flag nations involved would consider assumption of jurisdiction by the Board to be an unwarranted intrusion into their own domestic matters." (Brief Amicus, p. 12, *supra* p. 5.

In addition, the following pertinent points were made in the above-noted brief:

1. Congress did not intend the Labor Management Relations Act to govern the internal labor relations of a foreign ship and its foreign crew;

2. If a corporation organized under the laws of a foreign nation owns or operates a foreign flag vessel, manned by a foreign crew, its identification as a foreign vessel seems established, although the holders of stock in the corporation may be American in whole or in part.

In view of the foregoing, the position of the United States is unequivocally clear.

Conclusion

In the event that this Court grants certiorari, the questions to be reviewed should be as hereinbefore stated.

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May 29, 1962

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

Nos. 91 and 93

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board, *Petitioner,*

against

EMPRESA HONDURENA DE VAPORES, S. A., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 91
OCTOBER TERM
1962

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, *Petitioner,*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 93
OCTOBER TERM
1962

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

AND

BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICUS CURIAE*

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September 24, 1962.

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MOTION OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

By reason of the growing concern of the Government of the United Kingdom of Great Britain and Northern Ireland with respect to a series of decisions taken by the Na-

tional Labor Relations Board and federal and state courts within the United States during the past two years concerning matters affecting the internal economy of foreign flag vessels and the relationship between foreign flag ship owners and their crews, the Government of the United Kingdom respectfully moves for permission to file a brief *amicus curiae* in the above entitled actions.

The Solicitor General of the United States on behalf of Ivan C. McLeod, Regional Director for the Second Region of the National Labor Relations Board, Petitioner, and Empresa Hondurena De Vapores, S. A., Respondent, have consented to the filing of this brief. The National Maritime Union of America AFL-CIO, Petitioner in Case No. 93, has not.

Since this court is aware of the fact that the petitioner has long been somewhat involved in foreign trade, the movements of cargo and the international commerce of the world, no detailed summary of its interests in all phases of international trade will be submitted in support of its request to be heard in this litigation. Simply stated, the United Kingdom Government is gravely concerned, both on legal principle and economically, that this Honorable Court continue to recognize in this case the doctrine of the law of the flag.

It is respectfully requested that this motion be granted.

Respectfully submitted,

LAWRENCE HUNT,
Counsel for THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND.

Dated: September 24, 1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICUS CURIAE*

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement

This brief is filed by the Government of the United Kingdom as *amicus curiae*, because the legal principles and practical consequences involved in this case are of paramount

importance to all maritime nations, including the United Kingdom.

Whenever the domestic law of one country infringes upon or threatens to infringe upon the free flow of commerce between friendly nations the Government of the United Kingdom is seriously concerned. The Government of the United Kingdom respectfully points out that attempts to impose upon non-United States citizens the local law of the United States with respect to the rights of labor and managament are completely contrary to the frequently expressed intention of the Government of the United States.

The English-speaking nations, among others, have learned, in many cases in "the hard way", that it is neither proper nor practical to impose their own laws and decrees on the essentially internal affairs and management of other nations. A scrupulous respect for the independence of other nations is a major feature in the United States' relationship with other sovereign states. In international maritime commerce, the law of the flag is both the symbol and the most practical safeguard of that independence.

The policy of the United States as defined by statute is "to eliminate the causes of certain substantial obstructions to the free flow of commerce". (National Labor Relations Act, Section 1, 29 U. S. C. Section 151). The apparent conclusion of the National Labor Relations Board in this case that a country in which a foreign flag vessel happens to be at any given point in time has the right to substitute its local law for that of the vessel's flag in matters concerning only the internal discipline and economy of the vessel is not only contrary to the United Kingdom's understanding of American principles generally, but would greatly impede and obstruct all foreign commerce.

It may be too simple a view, even an outmoded view, to contend that a vessel is merely an extension of the territory of the State whose flag it flies. This doctrine, it is now

generally accepted, was based on a fiction or metaphor. It is, however, unnecessary to employ the fiction of territoriality to account for or to justify the "venerable and universal rule of maritime law which gives cardinal importance to the law of the flag". There are sound practical reasons for the rule of the subjection of vessels to the laws of the flag State; it rests upon principles of convenience, of international comity, and of international law. Under the latter, a State, when granting its nationality to a merchant vessel, both accepts responsibility for that vessel and acquires authority over it, and the vessel is accorded certain rights by other countries because of the flag it flies. For this reason, it has come to be generally accepted that even in territorial waters jurisdiction will not be exercised by the coastal State over foreign merchant vessels in matters which are primarily the responsibility of the flag State and, in particular, that "all matters of discipline and all things done on board" which do not involve the peace or tranquility of the coastal State should be left to the authority of the flag State. Any assumption of jurisdiction which is in conflict with these principles can only be regarded as inimical to international trade.

As this Court will note, the Government of the United Kingdom has also moved to file a brief *amicus curiae* in *Incres Steamship Company Ltd.* against *International Maritime Workers Union et al.* Both cases involve the same principle. It is true that in this case the stock ownership of the foreign flag vessel is American. We respectfully submit that stock ownership should not displace or impair the doctrine, so long maintained and so recently reaffirmed by this Court, that in matters concerning the internal discipline and economy of the vessel the law of the flag controls. It is a matter of major importance to the Government of the United Kingdom that the principle of the law of the flag be clearly sustained in this case.

Argument

For centuries it has been the law of the sea that so long as domestic peace and tranquility are not affected the internal problems arising between a vessel, its officers and owner, are matters governed by the laws of the vessel's flag. In the comparatively recent cases of *Lauritzen* v. *Larsen*, 345 U. S. 571, *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, and *Benz* v. *Compania Naviero Hidalgo*, 353 U. S. 138, this Court has recognized this principle and has held that the relationships between foreign shipowners and foreign seamen are not subject to the same laws as govern the relationships between American shipowners and American seamen. The soundness of the holdings of this Court in those cases is apparent as a matter of law and of common sense in encouraging trade among friendly nations. Speaking of the Labor Management Relations Act in the *Benz* case, this Court said that "Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws."

In the present cases, EMPRESA is admittedly the wholly owned subsidiary of an American corporation. However, Empresa is a legal corporate entity established under the laws of a foreign country, in this case the Republic of Honduras. Similarly it must be noted that the vessels owned by Empresa are registered under the laws of that foreign country; they fly its flag and are engaged in its foreign commerce. Both the corporation and its vessels are subject to the laws of that country.

There are few countries in the world in which there do not exist subsidiaries which are established under the laws of those countries, but which are wholly owned by citizens of the United States or, indeed, by those of the United Kingdom. The investment of American capital in the development of rubber plantations in Liberia, iron ore in Venezuela and Brazil, petroleum in the Middle East, and the

establishment of wholly owned American subsidiaries in those countries do not subject the labor employed by those subsidiaries in Liberia, Venezuela and Brazil to the jurisdiction of the National Labor Relations Board, and there is no reason why the investment of American corporations in a Honduran corporate entity which owns and operates vessels should, in law, have any different consequences. The fact that vessels are transitory does not diminish their nationality, nor the effect of their national law over their activities. In neither the one case nor the other is it the function of the United States, or of any maritime nation, to extend its jurisdiction over the citizens of other countries by imposing on them its own laws and standards of living.

It is submitted that stock ownership is, as a basis for jurisdiction, likely to give rise to grave uncertainties in international maritime commerce. Since stock ownership in corporations is subject to change without resulting in changes in basic corporate structure or the laws to which the corporation is subject, what effect would a sale of its entire stock interest by the American investor have upon the labor relations of the vessels, their crews and an American labor union, assuming that the National Labor Relations Board has jurisdiction over the current dispute? Would Honduras or other foreign purchasers of the stock of the foreign corporation operating foreign flag vessels be subject to the directives of the National Labor Relations Board? How could the Board enforce its directives if the vessels were engaged in trade which did not bring them to the United States?

Also, by way of hypothetical question, even if there were no change of stock ownership, if the Honduran courts were to find that Honduran law applies to the labor management relations of all vessels flying its flag, whose directives must the Honduran corporation follow?

The United Kingdom Government respectfully submits that stock ownership is too feeble and fluctuating, too uncertain and impracticable, to threaten or weaken the law

of the flag as the decisive and prevailing doctrine affecting the internal economy of a vessel.

The Court below (*Empresa Hondurena De Vapores, S. A.* v. *Mcleod*, 300 F. 2d 222 (1962), at 234), in Judge Friendly's lucid opinion, has summarized the Honduran "contacts" of *Empresa* in this case, which the Court said go "far beyond the flying of the Honduran flag, important as Lauritzen teaches that to be." The Court referred to "the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels' regular visits to Honduras, the Honduran corporate identity—admittedly not fictitious—of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters". The Court then said:

> "Though the vessels are engaged in the foreign commerce of the United States, they are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed, for the purpose here at issue, by Honduras' interests.

The United Kingdom Government respectfully submits that these contacts should not be decisive and that the paramount and controlling factor, as this Court has maintained and reaffirmed in the cases cited herein, should remain the "law of the flag". To substitute a standard composed of "contacts", which would have to be constantly weighed and reweighed, would not be a practicable aid to the free flow of international maritime commerce. The scales of justice are not apothecary's scales; they serve and regulate the practical affairs of men in the varied business of the world. Principles of law do not solely endure as abstract legal theories. They exist, they endure, because they work. Such a principle is the law of the flag. It is sound in law, as the "United States has firmly and successfully main-

tained" in *Lauritzen* v. *Larsen*, 345 U. S. 571, 584. And it works.

The cogent words of the United States Attorney General's brief, *amicus curiae*, in this case before the National Labor Relations Board (see pp. 15-20), should be emphasized here. That brief "submitted . . . that the flag, as a ready recognizable, and accepted standard must be preferred pragmatically to any other and that in accordance with that standard, the indirect financial interest of American citizens in a foreign registered ship may not deprive a vessel of its status as a national of the country whose flag is flown". (Quoted by the Court below in 300 F. 2d 222, at 225.)

This Court will bear in mind now, as in the recent past, that most if not all maritime nations, including the United Kingdom, have developed over a long period of time an integrated system of conditions of employment which includes full consultation between representatives of employers and employees on all aspects of employment and which specifically provides for methods for settling disputes. These systems reflect the individual customs, state of economic development, and standard of living of each nation. In the case of the United Kingdom, this system and these carefully developed methods have been very successful, and possible intervention by the National Labor Relations Board in their operation is necessarily a matter of the greatest concern to the United Kingdom Government.

It is respectfully and urgently suggested that this Court should exercise its power in affirming the decision of the Court of Appeals. It is also respectfully and urgently suggested that this Court, in as specific language as is practicable, indicate to lower courts, both state and federal, as well as to administrative agencies, that it is not their function to impose upon non-citizens, non-resident employers and employees, the American standard of employer—employee relations, and that the practicable principle of the law of the flag, so recently expounded by this Court,

still prevails to insure both the free flow and stability of international commerce. Such guidance would be an immensely stabilizing influence for all maritime nations at this time. In view of the foreign policy of the United States which is based on the concept of the full independence of all sovereign states and their freedom from any form of foreign domination, it would largely thwart the purpose of that policy to attempt to impose American law upon foreign steamship companies and would be contrary to both the old and the recent decisions of this Court.

CONCLUSION

The Law of the Flag should control in this as in past cases decided by this Court. Therefore, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, *Petitioner*

EMPRESA HONDURENA DE VAPORES, S. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 93

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, *Petitioner*

v.

EMPRESA HONDURENA DE VAPORES, S. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of national and international labor unions, which have approximately thirteen million members. Eight of these international unions, with a total membership of over two hundred thousand, are primarily engaged in seafaring activities or related shoreside trades. All told, some thirty Federation affiliates have about

eight hundred thousand members employed in positions directly or indirectly connected with the maritime field. These workers will all be affected, to a greater or lesser extent, by the decision of this Court on the jurisdiction of the National Labor Relations Board in the present case.

Whether the NLRB may exercise jurisdiction over ships flying a foreign flag is a question which may arise in countless different factual contexts. Petitioners in this and the companion case, *McLeod* v. *Empresa Hondurena de Vapores, S. A.*, No. 91, October Term, 1962, will naturally emphasize the facts and law of the particular situation presented here. In view of some of the broad contentions that have been interjected into this case in the courts below, the AFL-CIO desires to place before this Court certain material on the status of the American merchant marine and the attitude of Congress toward it, together with a general discussion of the development of the so-called "flag of convenience" fleet and the role it plays in the defense plans and foreign relations of the United States. Should this Court decide that it must reach the multitudinous policy issues it has been invited to consider, we feel our presentation will enable the Court to embark on the venture with a firmer grasp of the realities beneath the surface of the foreign-flag problem.

ARGUMENT

A large part of this brief may well be an essay in irrelevancy. First of all, we fully subscribe to the position of petitioner National Maritime Union that a federal district court has no jurisdiction to review the Board's direction of a representation election in the present instance.[1] Cf.

[1] We are also in accord with the respondents in *Incres Steamship Co.* v. *International Maritime Workers*, No. 33, October Term, 1962, that the New York State Court of Appeals correctly held the state

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. This jurisdictional point, which should be dispositive of the case, will be fully covered by the petitioner and we will not further concern ourselves with it. Secondly, assuming this Court feels it must reach the question of the applicability of the National Labor Relations Act to American commerce carried on under a foreign flag, we think that question should be met squarely as a legal issue requiring interpretation of the federal labor statute's jurisdictional provisions and of any relevant commitments of this nation under international law. Here again petitioner union, and the NLRB in the companion case, will say all that needs to be said.

If congressional labor policy interferes with what certain executive departments of the Government have become convinced is sound as a matter of defense and foreign policy, that is something for them to take up with Congress, not with this Court. But because such factors have been tendered for judicial attention in the present litigation, we will devote a major portion of this *amicus* brief to their treatment. A full exploration of even these essentially extraneous considerations will, we submit, serve only to reinforce the soundness of the union position. Therefore, after the briefest summary of our view of the applicable law, we propose to show that the upholding of NLRB jurisdiction in situations like this is entirely consonant with a realistic appraisal of defense requirements and a proper regard for international order, as well as being consistent

courts to be ousted of jurisdiction over the peaceful organizational activities involved in that case, since the controversy was "arguably subject" to the jurisdiction of the NLRB. How the Board might decide the question is at this point immaterial; what must be preserved is the Board's authority to make the initial determination. Only in this way can the "danger of state interference with national policy • • • be averted." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245.

with the long-standing attitude of Congress toward the development of an effective American merchant marine.

I. The NLRB Has Jurisdiction Over Labor Proceedings Arising From Essentially American Shipping Operations, Regardless Of The Foreign Registry Of The Vessels Involved.

As *amicus* the AFl-CIO does not intend to reiterate the thorough arguments of the National Maritime Union and the NLRB in support of the legal proposition that under section 2(6) and (7) of the National Labor Relations Act the Board has jurisdiction over labor proceedings arising out of what are essentially American shipping operations, regardless of the foreign registry of the vessels involved. To set the remainder of our brief in proper perspective, however, we wish to summarize briefly our understanding of the meaning and effect of the Board's doctrine.

1. Whenever its jurisdiction is invoked in a case involving a vessel flying a foreign flag, the NLRB will undertake to weigh, on the basis of the particular facts of each individual case, "the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority." See *Lauritzen* v. *Larsen*, 345 U.S. 571, 582. No *per se* theory is followed. When examination of the relevant facts reveals such contacts as "substantial continuing American foreign commerce" and "American ownership" or "an essentially domestic enterprise," jurisdiction is asserted. *West India Fruit and Steamship Co.*, 130 NLRB 343, 355 (1961); *Eastern Shipping Corp.*, 132 NLRB 930, 933 (1961). When a ship is shown to be engaged essentially in the commerce of another nation, however, jurisdiction will be declined, even though the vessel is American-owned and American-controlled and touches at American ports. *Dalzell Towing Co.*, 137 NLRB No. 48, 50 LRRM 1164, 1962 CCH NLRB ¶11,232 (May 29, 1962). This pragmatic, case-by-case approach

seems to us the only feasible way to cope with so complex a problem. Endorsement of this approach would of course not preclude reviewing courts from correcting an error by the Board in any given case.

2. In asserting jurisdiction the NLRB is not violating a rule that American laws cannot be applied to foreign-flag vessels, because there is no such absolute rule. *Wildenhus' Case*, 120 U.S. 1; *Marine Cooks and Stewards* v. *Panama Steamship Co.*, 362 U.S. 365; *cf. Lauritzen* v. *Larsen*, 345 U.S. 571, 579-582. The NLRB is not violating international or maritime doctrine or United States treaties declaring that the flag shall determine the nationality of the vessel, because the Board has expressly recognized that the foreign-flag ship over which jurisdiction is exercised retains its foreign nationality, just as does a resident alien in a bargaining unit in a Detroit automobile plant. *West India Fruit and Steamship Co.*, 130 NLRB 343, 359 (1961). The Board is not discriminating among the flags of any particular nations or group of nations, because the very point of its thesis is that the flag, as such, becomes irrelevant for federal labor law purposes once it is determined that "the shipping involved is essentially that of this nation and not that of a foreign nation which the exigencies of international trade have brought in contact with the United States" (R. 11-12). See also *West India*, *supra*, 130 NLRB at 366-367.

3. No niggardly interpretation of the jurisdictional clauses of the National Labor Relations Act is supportable. In that Act Congress undertook "to regulate all conduct having such consequences that constitutionally it can regulate." *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 647; *NLRB* v. *Fainblatt*, 306 U.S. 601, 607. Despite this

sweeping mandate, the Board has not applied the Act with blind literalness. It has carefully observed that "the term 'affecting commerce' must be here construed in conformity with court decisions delimiting the reach of domestic statutes with respect to their foreign impact." *West India, supra*, 130 NLRB at 391, n.20. But with this qualification given its due, we do not think that the regulatory power of Congress over an essentially American shipping operation in American commerce, as exercised through the federal labor law, can be defeated by the change of an ensign on a fantail.[2]

II. The Consistent Policy Of Congress Has Been To Encourage The Development Of A Native American Merchant Marine, And This Objective Is Not Being Achieved.

We are aware that this Court has chided litigants who have urged it to extend domestic law to a situation involving some foreign elements "as a means of benefiting seamen and enhancing the costs of foreign ship operation for the competitive advantage of our own." *Lauritzen* v. *Larsen*, 345 U.S. 571, 593. We have no intention of addressing such an appeal to this Court. On the other hand this Court has

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[2] We know this Court has said that the National Labor Relations Act is concerned with "industrial strife between American employers and employees." *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 144. But the Board's exercise of jurisdiction in foreign-flag cases has invariably involved vessels at least ultimately under American ownership or direction. And we trust we needs fear no return to the requirement of a proximate employment relationship before workers are accorded the rights of employees under the Act. Compare *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, with *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177.

also admonished the Labor Board that it "has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31, 47. We are dealing with a statute which by its terms covers situations like that in the instant case; and there is no express word from Congress, that an exclusion was granted to foreign-flag vessels. It will doubtless be argued that an exclusion should be inferred because otherwise a heavy blow will be dealt to certain presently existing foreign-flag fleets, especially the so-called "flag of convenience" fleets of Panama, Liberia, and Honduras (the "Panlibhon" states).

We think the supposed danger to the "flag of convenience" fleets is greatly exaggerated. But if the effect of approving Labor Board jurisdiction in these cases should prove beneficial to American seamen and to domestic shipping, even at the expense of some foreign-flag operations, then we say: that result would not be the least out of line with consistent congressional policy in the maritime field. Let it be emphasized that we do not ask this Court to make a policy decision in favor of American-flag operations. We simply urge it to apply the Labor Relations Act as written, and with an eye on the important objectives which Congress has traditionally sought to achieve in the maritime industry.

Congressional policy in this area finds its most comprehensive expression in the preamble to the Merchant Marine Act of 1936, 49 Stat. 1985, §101, 46 U.S.C. §1101, which reads as follows:

"It is necessary for the national defense and develop-

ment of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a *substantial portion of the water-borne export and import foreign commerce of the United States* and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) *owned and operated under the United States flag* by citizens of the United States, insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, *constructed in the United States and manned with a trained and efficient citizen personnel.* It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine." (Emphasis added.)

Much history lies behind that formulation. An express purpose of the LaFollette Seamen's Act of 1915, 38 Stat. 1164, which *inter alia* gave to all seamen the right to leave their ship when in harbor, was to force foreign vessels to observe American wage standards "as a means of retaining their crews for the return voyage"; this was expected to "equalize the operating expenses of foreign and domestic vessels engaged in over-sea trade and tend to build up our merchant marine." H. R. Rep. No. 645, 62d Cong., 2d sess., pp. 7, 14 (1914). Similarly, Senator Jones explained that a provision in the Jones Act Amendments of 1920, 41 Stat. 1006, §31, 46 U.S.C. § 597, granting foreign seamen the right to collect part of their unpaid wages when landing in American ports, was intended to further the objectives of the 1915 Act so that, "instead of placing a great burden on our

seamen and shippers," the result would be to "bring the wages of the seamen of other countries up to a level with our own." 59 Cong. Rec. 7037 (1920).

These piecemeal, indirect sorties against the cost differentials between American and foreign shipping proved unavailing. The Merchant Marine Act of 1936 made a frontal assault on the problem by authorizing construction and operating subsidies for vessels to be built in American shipyards and used on essential routes in the foreign commerce of the United States. 49 Stat. 1995, §501 (a), as amended, 46 U.S.C. §1151(a); 49 Stat. 2001, §601 (a), as amended, 46 U.S.C. §1171(a). The final words of Representative Sirovich in closing debate on the bill in the House may fairly be said to sum up the views of the vast majority of the members of both houses who spoke on the issue: "We must have American ships built by Americans, manned by Americans, and flying the American flag." 80 Cong. Rec. 10576 (1936). See also *id.* at 9899-9900 (Sen. Guffey); *id.* at 9916 (Sen. Copeland); *id.* at 10569 (Rep. Bland); *id.* at 10570 (Rep. Culkin); *id.* at 10571 (Rep. Moran); *id.* at 10572 (Rep. Crawford); *id.* at 10573 (Rep. Ramspeck). The responsibility of what is now the Federal Maritime Board was outlined by Senator Guffey when he said: "The amendments create a new commission • • • under which will be placed all of the administrative functions of developing an adequate merchant marine, under the American flag, to carry its domestic commerce and at least one-half of its water-borne foreign commerce • • •." *Id.* at 9900.

Against these fervently expressed expectations of Con-

gress must be set the statistics which chart the decline of the American merchant marine since World War II:

Employment Of American Seamen And Active Seagoing American Merchant Ships Over 1,000 Tons [3]

Year	No. Seamen	Year	No. Ships
1945	158,860	1946	2,332
1951	84,300	1950	1,145
1955	57,507	1955	1,026
1958	51,515	1960	930
1960	49,281	1961	933
1961	48,461	1962	890

The drop of the United States from its immediate post-war position as the world's leading maritime power is reflected in the following figures, which show us ranking

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[3] U.S. Dept. Comm., *U.S. Statistical Abstract* 600-601 (1962); U.S. Dept. Comm., Mar. Ad. News Release Nos. 61-92 (Dec. 1, 1961), 62-47 (Aug. 1, 1962). Figures for 1962 are as of August 1, and include 27 Government-owned vessels, so that we have now only 863 privately owned ships in active service. There were 897 such ships in active service as of December 1, 1961. Thus the decline shows little signs of slackening.

In 1959 it was estimated that there were 40,527 American seamen seeking employment, including 25,897 registered at the employment centers for unlicensed personnel maintained by the National Maritime Union, Seafarers International Union, and Sailors Union of the Pacific. Note, "The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies Against Shoreside Picketing," 69 Yale L.J. 498, 502, n. 32 (1960). There is a close correlation between these figures and the estimated 25,000 to 40,000 seamen's positions from which foreigners have displaced Americans. *Business Week*, June 10, 1961, p. 78.

fourth in terms of gross tonnage after the fleets of the United Kingdom, Norway, and Liberia:

Merchants' Fleets of Leading Maritime and Panlibhon Nations as of June 30, 1961 [4]

Country	Gross Tonnage (000's)	Totai Ships
United Kingdom	19,455	2,383
Norway	11,328	1,347
Liberia	10,667	836
United States	9,569	989
Japan	6,663	1,074
Panama	3,882	487
Honduras	94	21

In the light of the congressional policies previously discussed, perhaps the most meaningful figures of all are those which recount the enfeebling of our capacity to handle our

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[4] Federal Maritime Board and Maritime Administration, *Annual Report*, app. E, pp. 58-59 (1961); *Britannica Book of the Year* 427 (1962). Figures for the United States exclude vessels on the Great Lakes and 1,821 ships in the Maritime Administration's reserve or "mothball" fleet. Other countries having almost as many ships as the United States in their regular merchant fleets include the U.S.S.R. (910) and West Germany (859). *Ibid.* For earlier years see U.S. Dept. Comm., Mar. Ad., *Handbook of Merchant Shipping Statistics Through 1958* 28 ff., 119 (1959).

own foreign commerce. The course of this process since World War II can be gauged by the following:

Percentage of United States Foreign Trade Carried on American-Flag Ships [5]

Type of Trade	Year	Percentage
Totals, All Services	1946	65
	1951	42.9
	1960	10.5
Dry Cargo Exports	1946	60.9
	1960	15.5
Tanker Exports	1946	39.9
	1960	18.6
Dry Cargo Imports	1946	56.3
	1960	13.0
Tanker Imports	1946	75.8
	1960	3.4

For such vital defense requirements as oil, steel and aluminum, we are dependent on foreign shipping to the extent of almost 97 percent for our imported petroleum,

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[5] U.S. Dept. Comm., Mar. Ad., *An Analysis of the Participation of U.S. and Foreign Flag Ships in the Oceanborne Foreign Trade of the United States 1937, 1938; 1951-60* 6-9, 13 (1962) [hereinafter cited *Oceanborne Foreign Trade*]; *Hearings on the President's 1961 Tax Recommendations before the House Committee on Ways and Means*, 87th Cong., 1st sess., p. 2748 (1961) [hereinafter cited *1961 Hearings*]. Figures for dry cargo exports and imports for 1960 have been obtained by combining the Maritime Administration's separate figures for dry cargo carried by liners plying scheduled routes and by vessels other than liners, such as tramps.

and to the extent of almost 100 percent for our imported iron ore (which supplies about one-third of our iron needs) and for our imported bauxite (which supplies substantially all of our aluminum).[6] All told, during calendar year 1960 American-flag ships of every kind carried only 16 percent of all United States water-borne exports and 7.5 percent of all water-borne imports.[7]

Paralleling the decline of the American merchant marine has been the rise of the so-called "Panlibhon" fleets. This Court has already noted that "in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries." *Lauritzen* v. *Larsen*, 345 U.S. 571, 587.[8] As of December 31, 1961, foreign affiliates of United States companies owned 441 ships of over 1,000 gross tons which were registered under foreign flags, including 131 Liberian, 93 Panamanian and 13 Honduran.[9] But this is only part of the story. According to the latest figures that the Commerce and Navy Departments have made available, at one time or another during 1960 there were 540 merchant ships which were regarded as being under "effective United States control," that is to say, which were registered in Panama, Liberia,

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[6] *1961 Hearings, supra* note 5, at 2748. See also U.S. Dept. Navy, *U.S. Life Lines* 6, 13, 18 (1959).

[7] *Oceanborne Foreign Trade, supra* note 5, at 6-7.

[8] See generally Harolds, "Some Legal Problems Arising out of Foreign Flag Operations," 28 Ford. L. Rev. 295 (1959); Note, "Flag-of-Convenience Fleet," *supra* note 3, 69 Yale L. J. 498; Note, "Panlibhon Registration of American-Owned Merchant Ships: Government Policy and the Problem of the Courts," 60 Colum. L. Rev. 711 (1960); Shils, "The 'Flag of Necessity' Fleet and the American Economy," 13 Lab. L. J. 151 (1962).

[9] U. S. Dept. Comm., Mar. Ad., *Foreign Ships of 1,000 Gross Tons and Over Owned by United States Parent Companies*, Rep. No. MAR-560-22, pt. 1 (Dec. 31, 1961).

or Honduras and which the owners had more or less formally agreed to turn over to the United States in a national emergency.[10] The difference between the 237 Panlibhon ships owned by affiliates of American companies and the number considered to be under effective control is apparently accounted for by "vessels owned by foreign companies, the stock of which is owned by American individuals."[11]

In 1960 Panlibhon ships under effective United States control carried 23.3 percent of our total oceanborne foreign trade, over twice as much as the 10.5 percent carried on

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[10] *Oceanborne Foreign Trade*, *supra* note 5, at 4, n. 3. In 1959 there were 518 such ships. See Nat. Acad. Sciences, *The Role of the U.S. Merchant Marine in National Security* 34 (1959) [hereinafter cited *Project Walrus*]. The Government-sponsored "Project Walrus" report commented at that time:

> "Determinations regarding effective control are not founded on governmental treaties. Assurances that specific ships will revert to U.S. control are given by the U.S. owners of the ships, not by the country of registry. Former U.S. flag vessels that were transferred to PANLIBHON registry are under effective control as a result of stipulations in the transfer contract approvals granted by the Maritime Administration. Less formal agreements apply to foreign-built shipping. U.S. owners can register foreign-built shipping under any friendly flag of their choice, or transfer from one flag to another at will." *Id.* at 57. See also 46 C.F.R., pt. 221, app., p. 351 ff. (1958).

[11] Letter from Maritime Administrator, quoted in Note, "Flag-of-Convenience Fleet," *supra* note 3, 69 Yale L. J. at 499, n. 7. Altogether it is estimated that 40 to 50 percent of the Panlibhon fleet is controlled by United States interests, led by the great American petroleum companies, with Greek interests, sometimes backed by American capital, accounting for most of the remaining tonnage. 14 *Norwegian Shipping News* 1406 (1958); *Oceanborne Foreign Trade*, *supra* note 5, at 4 (11 or 12 million deadweight tons out of 24 million); Sørensen, *The Law of the Sea* 202 (International Conciliation No. 520, 1958); *Project Walrus*, *supra* note 10, at 55.

vessels flying our own flag.[12] And during that year the entire Panlib tanker fleet, which ranks as the world's largest and one of the most modern, handled 58 percent of our tanker trade, compared to a mere 5 percent handled by American-flag ships.[13]

In response to this documentation that American-flag vessels are not carrying that portion of our foreign commerce intended by Congress when the Merchant Marine Act of 1936 was passed, the Maritime Administration, the Defense Department, and others contend that strict compliance with the policy of the Act is impractical; that the existence of Panlibhon vessels under effective United States control provides the only feasible substitute and is essential to national defense; and that application of the federal labor law to this shipping would drive it to other registries where we could not maintain our effective control.[14] We reply that the briefest scrutiny of this whole notion of "effective United States control" will demonstrate that some of the highest ranking maritime and naval officials have not known exactly what they meant when they have spoken of effective control; that they have lacked definite plans for meeting a national emergency through the use of ships now supposedly under effective control; and that they have not shown that the application of the Labor Relations Act will significantly erode this shipping or any part of it.

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[12] *Oceanborne Foreign Trade*, *supra* note 5, at 4-5.

[13] *Id.* at 10-11; OEEC, *Maritime Transport 1960* 53 (May 2, 1961); *Merchant Shipping Statistics*, *supra* note 4, at 48-49.

[14] Such contentions were made before the NLRB in *West India Fruit and Steamship Co.*, 130 NLRB 343, 345, n. 4, 364-368 (1961), as well as in the instant and other cases (R. 9, n. 1). Unlike the traditional maritime powers, Panama and Honduras have imposed no significant restrictions, and Liberia only a few, on the control of merchant ships flying their flags. *Project Walrus*, *supra* note 10, at 58; Note, "Panlibhon Registration", *supra* note 8, 60 Colum. L. Rev. at 719-720.

Perhaps incidentally such an inquiry will also confirm the conclusion of one disinterested observer that "the relevant legislation looks toward the goal of an American-flag merchant marine, and the 1957 House hearings seem to indicate that the Maritime Administration has failed in the past to go to Congress with requests and recommendations to implement this congressional aim." [15] We turn now to a short study of the concept of "effective United States control."

III. The Concept Of "Effective Control" Is Ill-Considered, Deficient As An Element Of Defense Policy, And In Any Event Not Likely To Be Destroyed By The Application of Federal Labor Laws To American-Owned Panlibhon Shipping.

In 1957 the then Maritime Administrator appeared before the House Committee on Merchant Marine and Fisheries to discuss such problems as the transfer of vessels to foreign registries. The highly relevant issue of "effective control" was brought up, and the following colloquy took place: [16]

Q: "Can you outline for us the development of this concept of effective United States control * * *?"

A: "What factors we consider establish effective United States control? * * * Stock ownership is one. Majority of American shareholders and American directors is the second. The forfeiture proceedings in the event of a violation of our contractual commitments with the transferee, the penalty provisions in the contract, the fact that these countries are members of NATO so that the vessels are

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[15] Note, "Panlibhon Registration," *supra* note 8, 60 Colum. L. Rev. at 727.

[16] *Hearings on Vessel Transfer, Trade-In, and Reserve Fleet Policies before the House Committee on Merchant Marine and Fisheries*, 85th Cong., 1st sess., pt. 1, pp. 129-130 (1957) [hereinafter cited *1957 House Hearings*].

available in our defense requirements in the event of war involving the NATO countries."

Q: "Liberia and Panama are not NATO countries, are they?"

A: "No, but they are pretty well affected by the United States foreign policy and have been friendly countries and have made their ships available to us in past wars. These two countries have agreed to these conditions being attached."

Q: "Are there treaty arrangements?"

A: "It is not a treaty arrangement, I am sure, but at most it would be an informal letter of concurrence. It seems to me that the major reasons that there is effective United States control are two: One is the effectiveness of the United States Navy and secondly, the Ship Warrants Act, which is a stranglehold on all vessels whether American flag or foreign flag, if they ever want to have any services or bunkering, insurance or what have you, in a wartime situation."

Q: "Is the Ship Warrants Act in being?"

A: "I cannot recall whether it has terminated now or not . . . ." [Shortly hereafter in the record there was inserted by the Maritime Administration an unhappy little statement, which began: "We do not at present have ship-warrants legislation."]

In this remarkable passage the highest ranking civilian responsible for American maritime policy based his notion of "effective control" on (1) American stock ownership and contractual commitments (factors which were jettisoned completely when the recapitulation of hard-core reasons was reached); (2) NATO membership of the countries of registry (which doesn't exist); (3) some undefined "con-

currence" by the countries of registry (which hasn't prevented Liberia from placing limitations on the right to make vessels under its flag available for use by another country"); (4) the effectiveness of the United States Navy (a solid note, indeed, but one whose overtones may clash with the harmony usually sought in international relations); and (5) ship-warrants legislation (which no longer existed).

A somewhat similar path from reliance on American stockholders to reliance on the American Navy was traversed by the Assistant Chief of Naval Operations for Logistics in an appearance before the same committee. In his prepared statement he said:

> "Perhaps 'effective United States control' is not a fully descriptive term. A more realistic term might be 'effective United States management control' by which we mean that control which can be exercised by the United States Government through United States citizen directors and United States citizen majority stock ownership." [18]

Under questioning, however, the Admiral became even more realistic. The following exchange occurred: [19]

Q: "What I was getting at was if the ship were away from a United States port and the owner ordered it back to be delivered and the officers and men on the ship did not see fit to bring it back, have you any effective control except what the management has?"

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[17] Note, "Panlibhon Registration," *supra* note 8, 60 Colum. L. Rev. at 720, n. 78.

[18] *1957 House Hearings, supra* note 16, pt. 2, p. 553.

[19] *Id.* at 580. Doubt is cast on the Navy's ability to maintain control of these ships, even after acquiring it, by a subsequent exchange between the Admiral and committee counsel:

Q: "Would the Navy be in a position to convoy those ships?"

A: "No, we would not, without some preparation." *Ibid.*

A: "Only by seizure."

By 1959, when the Government-sponsored Project Walrus study was made, the importance attached to the element of raw power had emerged more clearly. After a preliminary nod to "these small, friendly countries," the report went on frankly to say:

> "PANLIBHON countries possess negligible capability to intercept, seize, or protect shipping on the high seas. Consequently, these nations are not in a position to expropriate U.S. property afloat *or to dispute U.S. assumption of control over selected shipping.*" [20]

Thus, except insofar as the crews of Panlibhon ships under ultimate American ownership might be more amenable to proceeding to an American port in an emergency, it would be just about as logical to conclude that the shipping of any small, weak nation is, right today, under effective United States control. This obviously makes the responsiveness of the crews of these Panlibhon vessels to American orders a matter of critical concern.

Project Walrus conceded candidly: "An acknowledged weakness in the reliability of U.S.-owned 'flag-of-convenience' ships is the crewing of such ships primarily by foreigners." [21] Senator Magnuson opened Senate hearings in 1957 with the comment: "To put it mildly, I am exceedingly skeptical as to the promised availability of these transferred vessels." [22] He later pointed to the results of a check by the Maritime Administration on a cross-section of flag of convenience ships. There were only 144 United States

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[20] *Project Walrus, supra* note 10, at 58. (Emphasis added.)

[21] *Id.* at 31.

[22] *Hearings on Ship Transfers to Foreign Flag before Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce*, 85th Cong., 1st sess., p. 3 (1957).

officers on 191 vessels. Out of a total of 1,145 licensed personnel, only 65 American citizens were serving in the key positions of master, chief engineer, and radio operator. And among more than 4,000 unlicensed personnel there were only 25 American citizens.[23]

American union spokesmen have been particularly emphatic about this problem. The Executive Secretary of the AFL-CIO Maritime Committee testified before Congress in 1957: "It is well-known that many foreign seamen and their unions are communistic or sympathetic to communism."[24] The Assistant Chief of Naval Operations for Logistics has admitted with regard to Panlibhon crews: "We have no means of screening the personnel."[25] After declaring that the Defense Department would prefer American registry of all ships needed for defense purposes and that the effective control concept "[a]dmittedly • • • has its faults," he nevertheless did no more than conclude with the bland reassurance that we had a "reasonable prospect" of securing Panlibhon ships in an emergency.[26] Neither he nor any other official of the Defense Department or the Maritime Administration affirmatively requested Congress to make possible the concededly superior solution of adequate shipping under the American flag.

Assuming the United States can acquire control of these Panlibhon vessels in an emergency, however, the question remains how they are to be manned once they are back under our flag. The lack of real thinking about even the most obvious elements and implications of this supposedly

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[23] *Id.* at 125.

[24] *1957 House Hearings, supra* note 16, pt. 2, p. 694. See also testimony of the Legislative Director of the AFL-CIO Maritime Trades Department, *1961 Hearings, supra* note 5, at 2749, 2751.

[25] *1957 House Hearings, supra* note 16, pt. 2, p. 570. See also *id.*, pt. 2, p. 606.

[26] *Id.*, pt. 2, pp. 552, 579-580, 602.

key defense concept of effective control is illustrated by another passage in the 1957 House hearings. The Assistant Chief of Naval Operations for Logistics was again being questioned:[27]

Q: "Do we have a mobilization plan which covers ships' officers and necessary skilled personnel, trained personnel?"

A: "No, sir; we do not for Maritime ships. May I ask Admiral Ford [Deputy Maritime Administrator] if he has one for Maritime? • • • [To Mr. Ford:] Do you have any plan for mobilizing American seamen for American ships?"

A [Mr. Ford]: "We have no definite plans."

If that is the concept of effective control, it constitutes a fragile underpinning indeed for national defense policy. But even granting *arguendo* that effective control possesses all the merits claimed for it, a second question is left: will the application of the Labor Relations Act in cases like the present one be seriously detrimental to the doctrine? We think not, for several reasons.

The Department of Defense has argued that if Panlibhon registry loses its advantages, foreign-built ships now under "effective control" will probably move to the registries of traditional European maritime powers, whose laws, unlike those of the Panlibhon nations, provide for the requisition of their ships in an emergency.[28] Thus our effective control would supposedly be lost.

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[27] *Id.*, pt. 2, p. 607. See also Note, "Panlibhon Registration," *supra* note 8, 60 Colum. L. Rev. at 721-722.

[28] See *West India Fruit and Steamship Co.*, 130 NLRB 343, 365-366 (1961). Panlibhon vessels originally under American registry can be further transferred only with the approval of the Maritime Administration, but this obsolescent war-built shipping is decreasingly important by comparison with the larger portion of the American-owned flag of convenience fleet, which was built and initially registered abroad. *Ibid.*; Note, "Panlibhon Registration," *supra* note 8, 60 Colum. L. Rev. at 720. See also note 10 *supra*.

This argument overlooks some simple facts. First, the major appeal of Panlibhon registry is not labor savings at all; it is tax savings.[29] Liberia, for example, imposes no tax whatsoever on the income of her flag vessels unless they are engaged exclusively in the Liberian coastal trade.[30] An American union spokeman has presented figures to Congress showing that in a typical tanker voyage from Iran to New York, the increased cost resulting from the use of an American crew instead of the cheapest foreign crew would be only one-fifth as much as the estimated United States federal tax on the profits of the voyage.[31] The Organization for European Economic Cooperation has likewise found in the tax feature the primary reason for the move to flags of convenience.[32] So regardless of the application of American labor laws and whatever effect they might have on wage structures, the basic attraction of Panlibhon registry would remain.

Secondly, the suggestion that shipowners would seek to escape NLRB jurisdiction by shifting from Panlibhon to European registry totally misconceives the Board's rationale for asserting jurisdiction. The Board has repeatedly declared that its jurisdiction depends on the nature of the commerce involved, not the particular flag, and that other conditions being equal, it would act the same way toward

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[29] See generally Note, "Flag-of-Convenience Fleet," *supra* note 3, 69 Yale L. J. at 500, nn. 18 and 19 and accompanying text; Note, "Panlibhon Registration," *supra* note 8, 60 Colum. L. Rev. at 715; Sørensen, *The Law of the Sea* 202-203 (International Conciliation No. 520, 1958).

[30] Liberian Code, tit. 35, §140(c) (1956).

[31] Testimony of Legislative Director, AFL-CIO Maritime Trades Department, *1961 Hearings*, *supra* note 5, at 2753.

[32] McDougal, Burke and Vlasic, "The Maintenance of Public Order at Sea and the Nationality of Ships," 54 Am. J. Int. L. 25, 32-33 (1960).

European-flag shipping as toward Panlibhon-flag shipping. See *West India Fruit and Steamship Co.*, 130 NLRB 343, 366-367 (1961); instant case (R. 11-12). Thus there would be nothing to gain in a transfer to a European flag.

Finally, even if there should be a move to the traditional maritime registries of Europe, it is hard to view this as a real disaster. Nearly all these powers are NATO members. And although the Federal Maritime Administrator apparently was ready, erroneously, to use NATO membership as a basis for justifying the effective control concept in the case of the Panlibhon nations,[33] surely his underlying premise was sound. Most foreseeable major emergencies involving this country would inevitably involve the NATO countries, and their shipping would be as much available to us and the common effort as shipping flying any flag except our own.

We are left with no satisfactory explanation for the willingness of the Defense Department and the Maritime Administration to champion, as a matter of national defense policy, the immunity of Panlibhon-flag vessels from NLRB jurisdiction. Perhaps, as some of the preceding discussion indicates, it is merely the result of fuzzy thinking. Perhaps it is an instance where an uncritical and unconscious parallelism has come to characterize the thinking of closely allied military and industrial establishments.[34]

In any event, we do not see why the decision in these cases should turn, so far as defense policy is concerned, on whether there is solid reality behind the concept of "effec-

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[33] See text accompanying note 16 *supra*.

[34] *Cf.* the parting warning by President Eisenhower against an increasing concentration of power and decision-making in a giant military-industrial complex. *N.Y. Times*, Jan. 18, 1961, p. 1, col. 8, p. 22, col. 4.

tive control" or not. If there is, and the United States properly regards certain Panlibhon ships as occupying a genuine place in our defense scheme despite their foreign registry, we still find no more reason for exempting them, when engaged in American commerce, from the application of the Labor Relations Act than for exempting any other "enterprise affecting national defense and subject to foreign competition of countries with lower business taxes than, and terms of employment inferior to, those prevailing in this country." *West India Fruit and Steamship Co.*, 130 NLRB 343, 370 (1961). If there is no solid reality behind the concept, then of course there is no valid defense purpose which could be served by exempting Panlibhon vessels from the coverage of the Act. At the very most we find here a policy issue in the realm of defense economics, which should be decided by Congress and not by this Court.

IV. NLRB Jurisdiction Over Foreign-Flag Shipping Engaged In American Commerce Does Not Violate International Law; At Most It May Interfere With An American Foreign Policy Aimed At Upholding The Ill-Considered Concept Of "Effective Control."

We would be sympathetic toward the position of the State Department in the present litigation, if the NLRB in asserting jurisdiction were violating well-established principles of international law and comity, or if the State Department's position were based on a deep solicitude for the rights of the world's maritime powers. But neither condition applies. We will not duplicate the legal arguments of the NLRB and petitioner National Maritime Union that the Board's exercise of jurisdiction in these cases does not infringe the rights of the flag countries under

either general international law or specific treaties. For the most part we will confine ourselves to showing that the attitude of the State Department toward flags of convenience appears to bear more the earmarks of international politics than of international jurisprudence, and that the Department's ostensibly legalistic approach seems to have been dictated by the desire to preserve the highly dubious concept of "effective control."

In 1958 the United Nations Conference on the Law of the Sea was held at Geneva. Prior to the conference the Organization for European Economic Cooperation had studied the flag of convenience problem, and its eighteen member nations unanimously adopted a report stressing the importance of requiring a "genuine link" between a ship and its flag.[36] This was in keeping with a substantial

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[35] Art. X of the United States-Honduran Treaty of Friendship, Commerce and Consular Rights, dated Dec. 7, 1927, 45 Stat. 2618, 2625-2626, TS No. 764, requires each nation to recognize ships flying the other's flag as the latter's nationals. Art. XXII of the Treaty, *id.* at 2634-2635, grants consular officers of the flag nation "exclusive jurisdiction" over matters arising out of the "internal order" of the flag nation's ships and concurrent "jurisdiction" over wages and wage contracts. Parallel provisions are found respectively in art. XV of the United States-Liberian Treaty of Friendship, Commerce, and Navigation, dated Aug. 8, 1938, 54 Stat. 1739, 1745, TS No. 956, and in art. X of the United States-Liberian Consular Convention, dated Oct. 7, 1938, 54 Stat. 1751, 1756, TS No. 957. The United States has no such agreements with Panama.

The Labor Board has expressly recognized the foreign nationality of the ships involved in all these cases, but has quite correctly pointed out that the disputes in which it has intervened do not relate solely to the internal order of the vessels but have important consequences for the littoral state. *West India Fruit and Steamship Co.*, 130 NLRB 343, 357-359 (1961); instant case (R. 10, fn. 3).

[36] 14 *Norwegian Shipping News* 514 (1958). See also Harolds, *supra* note 8, 28 Ford L. Rev. at 297.

body of scholarly thinking to the effect that, whatever might be the clichés regarding the paramountcy of the flag, in actual practice other more meaningful links, such as "national ownership" in the sense of ownership by the state or its citizens, were preeminent.[37] The International Law Commission (ILC), charged with responsibility for preparing draft conventions for the Geneva Conference, followed through with this pertinent proposal:

> "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship."[38]

The United States, joined as might be expected by such nations as Liberia and Panama, led the attack on the key

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[37] See Watts, "The Protection of Merchant Ships," 33 Brit. Yr. Bk. Int. L. [1957] 52, 84 (1958) ("[n]ational ownership as a basis for protection, however, would appear to be in accord with the law concerning protection in general, and is also supported in practice"). *Cf.* "Joint Final Report of the Commissioners," 29 Am. J. Int. L. 329, 330 (1935) (denying Canada recovery for the sinking by the United States of the *I'm Alone*, which, "although a British ship of Canadian registry, was *de facto* owned, controlled, and at the critical times managed" by American citizens); *The Nottebohm Case* (Second Phase), [1955] I. C. J. Rep. 4, 23 (the legal bond of nationality must accord "with the individual's genuine connection with the State"). See also Sørensen, *The Law of the Sea* 204-205 (International Conciliation No. 520, 1958); Jessup, "The United Nations Conference on the Law of the Sea," 59 Colum. L. Rev. 234, 256 (1959) ("[t]he 'link' theory • • • could easily be utilized internationally to determine the national character of corporations and ships").

[38] 4 *U.N. Conference on the Law of the Sea, Official Records* (A/CONF.13/40) 113 (1958) [hereinafter cited *Geneva Conference*].

last sentence of the ILC draft.[39] In committee, however, an attempt to excise the phrase "for purposes of recognition • • • by other States" was defeated by 39 votes to 13, with 6 abstentions.[40] Then, in the plenary session, the alignment changed, and by a vote of 30 to 15, with 17 abstentions, the final sentence in what is now article 5 of the Convention on the High Seas was watered down to read as follows: "There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."[41]

Professor Max Sørensen, head of the Danish delegation to the conference, laconically attributes the shift in the vote of several delegations to "extensive lobbying."[42] There seems little mystery about the source of, or reason for, the lobbying. At an Intergovernmental Shipping Conference in 1959, Under Secretary of State Douglas Dillon declared that "*until such time* as it may prove feasible for these American shipowners to operate competitively under the United States flag, my government retains its interest in the continued operation of ships under foreign flags, including the PANLIBHON registries. From our view-point there are important and valid defense requirements which support this position."[43]

We of course do not suggest that the maneuvering behind the adoption of article 5 casts any doubt on its valid-

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[39] *Id.* at 22, 29, 64.

[40] *Id.* at 75.

[41] 2 *Geneva Conference* (A/CONF.13/38) 20 (1958); Convention on the High Seas, art. 5, *id.* at 136.

[42] Sørensen, *The Law of the Sea* 205 (International Conciliation No. 520, 1958).

[43] Quoted in Note, "Panlibhon Registration," *supra* note 8, 60 Colum. L. Rev. at 722. (Emphasis added.)

ity.[44] Indeed, the Labor Board has fully complied with the mandate of this provision, even as finally approved, by expressly recognizing the foreign nationality of flag of convenience vessels. But a proper evaluation of the State Department's stand on this whole problem requires, we feel, an understanding of the Department's motives and a realization that its policy toward Panlibhon shipping has on repeated occasions placed it at odds with a majority of the maritime powers of the world.

Illustrative of this last fact were the 1959 London sessions of the new United Nations Inter-Governmental Maritime Consultative Organization (IMCO). The inaugural meeting was "nearly disrupted" when a bitter dispute broke out over the right of Panama and Liberia to secure two of the seats reserved for the eight "largest ship-owning nations" on the Maritime Safety Committee, a permanent organ of IMCO.[46] The United States backed the claims of Panama and Liberia. However, other traditional maritime powers, contending that these two countries did not qualify on the basis of tonnage nationally owned by the state and its citizens, prevented their being seated on the Committee at the conference.[47] As one commentator has observed, the American positions at both the Geneva and London conferences were stated in purely legal terms, but "the very

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[44] The Convention has been ratified by the United States but is not yet effective for want of sufficient ratifications by other nations (R. 79-80).

[45] See note 35 *supra*.

[46] Jessup, *supra* note 37, 59 Colum. L. Rev. at 257.

[47] Note, "Panlibhon Registration," *supra* note 8, at 725-726. The controversy eventually had to be settled by the International Court of Justice, which ruled in 1960 that Panama and Liberia were entitled to membership on the Maritime Safety Committee on the basis of the Convention establishing IMCO. *Constitution of the Maritime Safety Committee*, [1960] I. C. J. Rep. 150.

line-up of nations on the issues presented suggests that political and economic factors were controlling."[6]

Plainly, therefore, the NLRB's exercise of jurisdiction over Panlibhon shipping that is American-owned or American-controlled and is engaged in American foreign commerce poses no threat to the majority sentiments of the international community, however much certain departments of our own Government may have convinced themselves that some prop of national defense has been placed in jeopardy. Furthermore, any misgivings by other countries that the Labor Board has embarked on a broadside assertion of jurisdiction over all foreign commerce touching our shores should have been sufficiently allayed by the Board's recent decision in *Dalzell Towing Co.*, 137 NLRB No. 48, 50 LRRM 1164, 1962 CCH NLRB ¶11,232 (May 29, 1962). The NLRB there made clear that shipping which is genuinely part of the commerce of another country will not be considered subject to the Labor Relations Act, even though the vessels involved are owned and controlled by Americans, and sporadically or regularly put in to American ports.

To compel the Labor Board to do more than this, to compel it to withhold its processes when a labor dispute arises out of what is truly American commerce, is not required by any established principle of international law or by any well-grounded national objective of the United States. And it would be a deep disservice to American seamen, to American labor standards, and to the consistent congressional policy of promoting a viable and effective American merchant marine.

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[6] Note, "Panlibhon Registration," *supra* note 8, 60 Colum. L. Rev. at 726.

CONCLUSION

We do not ask this Court to reverse the judgment below for the reasons which have occupied the major portion of this brief. We ask for reversal for the reasons submitted in full by the NLRB and petitioner National Maritime Union, *viz.*, that this is the result called for by section 2(6) and (7) of the National Labor Relations Act and that international law and our international commitments call for no other result. Insofar as this Court may feel it necessary to consider some of the wide-ranging policy contentions made in this litigation, however, our discussion demonstrates that there are no sound grounds in defense or foreign policy for varying the result prescribed by law.

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IN THE

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OCTOBER TERM, 1962

No. 93

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

vs.

EMPRESA HONDURENA DE VAPORES, S.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 93

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,

vs.

EMPRESA HONDURENA DE VAPORES, S.A.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit (R. 59) is reported at 300 F. 2d 222. The opinion of the District Court for the Southern District of New York (R. 46) is reported at 200 F. Supp. 484.

Jurisdiction.

The judgment of the court of appeals was entered on January 12, 1962 (R. 83). The petition for a writ of certiorari was filed on April 11, 1962 and was granted on June 11, 1962 (R. 88). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Statute Involved.

Petitioner National Maritime Union of America, AFL-CIO (NMU) contends that the Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U. S. C. §§141-187 (LMRA), is applicable to Empresa's maritime operations. Pertinent provisions of the Act are set forth in Appendix A. Also in Appendix A are Articles 10 and 22 of the Treaty of Friendship, Commerce and Consular Rights Between The United States and Honduras, 45 Stat. 2618 (1927), which are cited in the court of appeals' opinion.

Questions Presented.

1. Does a federal district court have original jurisdiction to review and enjoin an NLRB decision directing an election where no showing of violation of constitutional or express statutory rights has been made, and full judicial review of the Board determination may be had in the circuit court after the election under the statutory review procedures of the LMRA, §10(e) and (f) (29 U. S. C. §160(e) and (f))?

2. Does the NLRB have jurisdiction over the Honduran flag vessels of United Fruit Company, which are operated in United States commerce through a wholly owned and controlled Honduran subsidiary as part of a single integrated fleet of American and Honduran flag vessels used to carry United Fruit's own tropical produce to American markets?

Statement of the Case.

This case, *McLeod* v. *Empresa* (No. 93), and *McCulloch* v. *Sociedad* (No. 107), involve identical facts and present

the identical issue as to the NLRB's jurisdiction over foreign flag ships. An additional issue not presented in the other cases is presented here, *i.e.*, whether a federal district court has original jurisdiction to review and enjoin an NLRB decision directing an election in a case of this kind. While the Board refrained from raising this question in its petition for certiorari in No. 91, it reserved the right to argue it.

A petition for certiorari in a fourth identical case, *NMU v. Sociedad* (No. 141), was filed on May 23, 1962 but has not yet been acted upon by the Court.

The issue of Board jurisdiction over foreign flag ships is also presented in *Incres Steamship Company, Ltd.* v. *International Maritime Workers Union*, No. 469, October Term, 1961, in which briefs have already been filed, and which is scheduled for argument with this case.

Parties.

Petitioner NMU (intervenor-defendant below) is an American maritime union comprised of approximately 40,000 unlicensed seamen employed on vessels engaged in commerce on the deep seas and other navigable waters.

Respondent Empresa (plaintiff below) is a Honduran corporation wholly owned and controlled by United Fruit, and holding title to United Fruit's Honduran flag vessels.

The Threat of Flag of Convenience Shipping to the Livelihoods of American Merchant Seamen.

Job opportunities for American merchant seamen have drastically declined since World War II, forcing many who followed the sea as their calling to seek livelihoods elsewhere. Depressed employment conditions have naturally

weakened the strength of American maritime unions in collective bargaining and restricted their bargaining goals.

As is commonly known, the economic plight of the American merchant marine is directly attributable to the relentless competition of modern giant Panlibhon fleets which enjoy the incomparable advantages of cheap labor and exemption from United States taxes. They threaten American flag shipping with near extinction.

Since Panama, Liberia and Honduras are the favorite countries for convenience registry, the word Panlibhon has been coined to denote convenience shipping the world over. Available statistics show a continuous decline in employment on American flag ships from 158,860 in 1945 to 49,281 in 1960 (Note, "Panlibhon Registration of American Owned Merchant Ships," 60 *Columbia L. R.* 711, 712, n. 13 (1960); *Hearings On Vessel Transfer, Trade-In, etc., Before Committee On Merchant Marine*, H. R., at p. 715, 85th Cong., 1st Sess. (1957)); and a corresponding increase in tonnage of Panlibhon vessels from 1,745,048 gross tons in 1950 to 6,388,000 gross tons ten years later (Note, "The Flag Of Convenience Fleet," 69 *Yale L. J.* 498, 499, nn. 6, 8 (1960)). Savings in labor costs and taxes are generally conceded to be the factors behind the growth in Panlibhon fleets (Note, *op. cit.*, 60 *Columbia L. R.* at 715). This Court took cognizance of the phenomenon in *Lauritzen* v. *Larsen*, 345 U. S. 571, 587 (1953):

> "... it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them."

The impact of foreign registration is reflected in the percentage decline of United States oceanborne foreign trade carried in American bottoms from 49.2% in 1951 to 10.5% in 1960 (*Analysis of Participation of U. S. And Foreign Flag Ships In Oceanborne Foreign Trade in United States, 1937, 1938, 1951-60;* U. S. Department of Commerce, Maritime Administration, 1962, at pp. 6-7). In contrast, in 1960 almost 40% of our foreign trade was transported in ships of Panlibhon registry (*ibid.*, at p. 4).

An equally dismaying aspect of the trend is that the newest and most modern commercial vessels being built by American interests are being launched under Panlibhon flags. Thus, the American tanker fleet, which now ranks but fourth in the world, is composed of ships between fifteen and twenty years old, while only 21% of the total fleet is under five years old. In contrast, 57% of the Liberian tanker fleet is under five years old, while only 10% is between fifteen and twenty years old. As a result of recent technological improvements in the construction of tankers, a tanker over fifteen years of age is generally considered to be obsolete for oceanborne transport (OEEC, *Maritime Transport 1960*, May 2, 1961, at p. 53).

The wages of American union seamen are the highest in the world, and their working conditions are the finest. They are also the beneficiaries of industry-supported pension, welfare, vacation, and employment security programs providing fringe benefits unequaled by seamen of any other nation. It has been estimated, for example, that the daily manning cost of a T-2 type tanker of 16,500 deadweight tons is $1200 under United States flag, and only $280 under foreign flag (*Hearings on Vessel Transfer, Trade-In, etc., before Committee on Merchant Marine*, H. R., at pp. 51, 57, 85th Cong., 1st Sess., 1957).

The precarious state to which Panlibhon competition has reduced American flag shipping is nowhere better illustrated than in this case. For here, as we shall see, an American company is operating a large integrated fleet of vessels comprised of both Honduran and American flag ships. The vessels are used interchangeably regardless of flag in the identical trade, and it is otherwise impossible to distinguish the operations of one from the other with the single qualification that the wages of crewmembers on the Honduran flag vessels are a fraction of the wages of their fellow seamen on American flag vessels. It requires no great insight into the economics of the maritime industry to appreciate the advantages of operating under Honduran flag.

To save their livelihoods, America's merchant seamen, through their maritime unions, have been compelled to attempt to organize Panlibhon shipping. Their objective is to improve job conditions on Panlibhon ships and thereby lessen the depressing effects on American flag ships. If the disparity between American and Panlibhon wages can be reasonably reduced, foreign flag registry may no longer be so attractive to American shipping interests.

The maritime unions have limited their organizing efforts to shipping operations which are essentially United States enterprises. They have no intention of seeking to organize vessels flying the flags of traditional maritime nations such as England, France, Norway, Belgium, Holland, etc., where the shipping possesses a genuine foreign character or is not simply the "adjunct of a domestic corporation's operations in the international trade of the United States, and, thus . . . the shipping of this nation" (R. 12).

The Operations of United Fruit and Empresa in United States Commerce.

Following a lengthy hearing in which the shipping activities of United Fruit and Empresa were extensively explored, the NLRB concluded that the enterprise was essentially that of a domestic company in the foreign trade of the United States and therefore within the coverage of the LMRA. The witnesses on whose testimony the Board relied were all employees or officers of United Fruit.

United Fruit is an American company with diverse world-wide interests; it is largely owned by American stockholders (R. 12). Its main concern, however, is with the raising of bananas, sugar, cacao and other tropical produce and with their transportation to market and sale (R. 12). The bulk of its trade is between Central and South American ports and United States ports. It carries its produce in ships it either owns or charters, including those involved in this case (R. 12).

United Fruit in part conducts its operations through some fifty to sixty wholly owned subsidiaries, of which Empresa is one (R. 12). Unlike many holding companies, United Fruit is also an operating company and exercises close supervision and control over the activities of its subsidiaries (R. 13). Expansion, contraction or other changes in the operations of the subsidiaries are determined by United Fruit based not on the needs of the subsidiaries for advancement as independent enterprises, but rather on United Fruit's overall business requirements in the production, transportation and sale of tropical produce (R. 13).

Thus United Fruit formed Empresa in 1941 as the nominal titleholder of its Honduran flag ships (R. 13). The entire capital for the venture, including a number of

vessels already built, was furnished by United Fruit, which elects all directors of Empresa, who in turn appoint all officers of Empresa (R. 13; S. M.[1] 154, 356, 463, 495).

From the time of its formation, Empresa has never operated the vessels which it nominally owns, or which are nominally owned by another United Fruit subsidiary and assigned to Empresa as "managing agent" (R. 13-15). There were seventeen such vessels at the time of the Board hearing (R. 13), but the complaint alleges that there are now only thirteen (R. 1). The vessels have never carried either cargo or passengers on Empresa's own account, nor does Empresa hold the vessels out in the world charter market as available for hire (R. 2, 13-14).

On the contrary, since its formation, Empresa's business has been limited to time chartering its vessels to United Fruit, and Empresa's income derives solely from charter fees paid to it by United Fruit (R. 13). A time charter is an arrangement for leasing a vessel together with captain, crew, food stores, equipment and all property attested to in its classification certificate (S. M. 187). The time charterer (United Fruit) determines what to do with the vessels (S. M. 189).

United Fruit uses the vessels it time charters from Empresa to carry its own tropical produce, and the vessels regularly call at United States ports on voyages from Central or South American countries (R. 15). United Fruit determines what voyages the vessels shall make, their ports of call, their length of stay in various ports, and what cargoes they shall carry. In exercising these functions, United Fruit deals directly with the masters of the vessels (R. 14). In the course of a voyage, the master maintains

[1] The reference S. M. is to the transcript of the NLRB hearing which is part of the unprinted record in *McCulloch* v. *Sociedad*, No. 107.

constant communication with United Fruit's marine department, receiving instructions and making reports (S. M. 224-226).

Supplies for both United Fruit's Honduran and American flag vessels are purchased in this country from Maratrop Trading Corporation, another wholly owned United Fruit subsidiary (R. 14, n. 14). Honduran and American flag vessels are usually dry docked and repaired in the United States, and decisions as to capital improvements for the vessels or the purchasing of new vessels and the scrapping of old ones are made by United Fruit (R. 14, n. 13). United Fruit, of course, advances the funds for the acquisition of new vessels by Empresa (S. M. 115, 116, 463). Empresa's capital expenditures and other substantial changes in operation are determined by United Fruit, based on United Fruit's needs for waterborne transportation both present and projected (R. 15). In short, the size of Empresa's fleet at any time is determined by United Fruit.

Approximately 60% of the officer personnel on the vessels reside in the United States and many are American citizens (S. M. 583, Empresa Ex. 25A-O).[2]

While Empresa alleges in its complaint (R. 4), and the court below repeated (R. 60), that all but one of the unlicensed crewmembers is a citizen of Honduras, the record of the Board hearings shows that more than 5%, and perhaps as many as 10% of the unlicensed crew complement are either American citizens or resident aliens (S. M. 583, Empresa Ex. 25A-O).[3] From time to time unli-

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[2] All references to exhibits are to exhibits in the Board hearing, none of which is printed.

[3] Sociedad's complaint in Case No. 107 (at p. 2 of the record) contains the qualified allegation that "all of the seamen *supplied to Empresa by Sociedad* are citizens of Honduras except one. . . ." (italics added).

censed crewmembers are hired in the United States (S. M. 428, Empresa Ex. 15A-D). The plaintiff in *Zieliuski* v. *Empresa Hondurena de Vapores*, 113 F. Supp. 93 (1953), was hired in the United States.

In addition to the Empresa vessels, United Fruit operates a fleet of approximately twenty ships under American flag (R. 15, S. M. 192), employing some eight hundred unlicensed seamen (S. M. 184, United Fruit Ex. 10). For many years a collective bargaining agreement has been in effect between United Fruit and NMU governing the terms and conditions of employment of these seamen (S. M. 179-180). Their wages are substantially higher than the wages of the seamen working on United Fruit's Honduran flag ships (S. M. 617, 618).

The operations of the Honduran and American flag vessels are fully integrated (R. 15). All vessels function under the control of United Fruit's marine division which uses them interchangeably to carry the same types of cargo and call at the same domestic and foreign ports (R. 15). In determining which vessel to assign to a particular run, the marine division bases its decision on availability, size and speed, and not on the flag or nominal ownership of the vessel (R. 15).

United Fruit's marine division solicits general cargo business for all vessels without distinction as to flag (S. M. 89). Scheduling of runs is controlled by the marine division, which fixes the destination, departure and arrival times for all vessels (S. M. 89, 98, 99, 212, 213). All vessels operate in the same trade routes and use the same dock and terminal facilities (S. M. 140, 141, 161, 183, 184, 251, 254; United Fruit Ex. 6G; NMU Ex. 4). Cargo and passenger

rates, which are set by the marine division, are the same for all vessels (S. M. 96, 97).

In annual reports to its shareholders, United Fruit refers to the vessels involved in this case as its own, and even points out that certain of them have been built to its own specifications. Nothing in the reports indicates that United Fruit considers the vessels to be other than its own or to be otherwise than completely under its control (R. 16, n. 18).

United Fruit complies with section 801 of the Merchant Shipping Act (46 U. S. C. 1220) which requires American companies to file detailed annual financial and operating reports with the United States Maritime Commission. United Fruit includes in its reports full details concerning the vessels involved in this case (S. M. 631-633, 638, 659).

During World War II, the United States War Shipping Administration requisitioned the Empresa vessels for war service (S. M. 80, 81, 280, 327-328).

On the basis of these and other facts, the Board concluded that "Empresa's maritime operations are a part of a single integrated maritime operation under the continuous direct control and either direct or ultimate ownership of United Fruit and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation" (R. 16). The Board further observed that "the relationship between United Fruit and Empresa is one in which the affairs of the subsidiary are designed essentially to further the shipping operations of the parent and not one in which Empresa is considered an independent undertaking whose success or failure is gauged by its role in the open market.... Empresa's vessels are utilized by United Fruit as an integral and necessary part of its fleet of vessels and not

chartered as an alternative to acquiring vessels elsewhere or only to meet particular contingencies that may arise" (R. 15-16). In short, Empresa and United Fruit are "joint employers" of the affected crewmembers (R. 16).

The Litigation.

Upon obtaining pledge cards from a majority of the non-officer seamen on Empresa's vessels, NMU filed a petition with the Board seeking an election in the appropriate unit (R. 9). United Fruit and Empresa participated fully in the hearing which followed and in all subsequent stages of the proceeding (R. 9-10). After the close of the hearing but before rendering its decision, the Board served notice on Sociedad, a Honduran union, inviting it to intervene and state its position. Receiving no reply to the notice, the Board concluded that Sociedad was not interested in being a party to the proceeding (R. 17, n. 22). A claim by Empresa that its contract with Sociedad was a bar to the proceeding was rejected by the Board, since the contract expired before the Board issued its decision (R. 17, n. 23).

Meanwhile, after the close of the hearing but again before the Board's decision, another Honduran union, Sindimar, requested and was granted the right to intervene and to be placed on the ballot (R. 17, n. 22).

Following issuance of its decision on November 15, 1961 (R. 9), extensive election preparations, in which Empresa and United Fruit participated, were undertaken by the Board. Arrangements were made for the election to begin on December 17 and continue through January 31, 1962 upon arrival of Empresa vessels in United States ports. Those employees who were not afforded

an opportunity to vote in this manner would receive a mail ballot (R. 47).

In the late afternoon of the Thursday (December 14, 1961), Empresa, by order to show cause returnable in the District Court for the Southern District of New York, sought a temporary injunction against the election. NMU, not named as a party to the action, intervened and opposed the application. Sociedad appeared on the return of the motion in support of the application. At approximately the same hour on Saturday, December 16, that Judge Palmieri of the Southern District denied Empresa's motion for a temporary injunction, Sociedad secured an *ex parte* stay of the election from Judge Keech of the District Court for the District of Columbia.

Thereafter, Empresa appealed to the Court of Appeals for the Second Circuit, which reversed Judge Palmieri and granted the application for a temporary injunction (R. 59-82). The Court of Appeals' decision was rendered without benefit of the transcript of the Board hearing, which was not made part of the record by Empresa. Judge Hoitzoff similarly granted Sociedad's application for an injunction in the District of Columbia.

SUMMARY OF ARGUMENT.

Jurisdiction in this action should have been declined at the outset, because NLRB rulings in election cases are not reviewable by district courts except in very limited situations not present here. In upholding district court jurisdiction, the court of appeals stripped the Board of power to determine its own jurisdiction in the entire field of the United States foreign commerce, including shipping, and turned over authority to the district courts of fifty states. This makes a shambles of the congressional pur-

pose to achieve a uniform national labor policy through administration of the LMRA by a single paramount agency.

In overruling the Board and holding that it had no jurisdiction over the maritime operations involved, the Court of Appeals failed to accord to the Board's findings the weight and respect to which they are entitled. After careful review of the record in which it stressed operational facts, the Board concluded that the vessels in question were an integrated phase of United Fruit's American business. The court of appeals, without benefit of the record of the Board hearing, erroneously placed overriding emphasis on the vessels' symbolic and peripheral Honduran contacts, such as the flag and the Honduran nationality of the crew members.

Application of the Act to the vessels is not extraterritorial since the operations are entrenched in the commerce of this nation. Besides, the Act may be applied extraterritorially, the same as our antitrust laws, since Congress' purpose was to minimize burdensome effects on the foreign as well as the domestic commerce of this nation.

Benz v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1958), does not stand for absolute exemption of all foreign flag ships from Board jurisdiction regardless of American connections. By stressing a tramp steamer's temporary and fleeting contacts with an American port, *Benz* supports Board rulings that application of the Act to foreign flag ships is to be determined by case-by-case evaluation of American contacts as compared to foreign contacts.

In determining the jurisdictional reach of the LMRA, the possibility of conflict with Honduran laws is irrelevant, in addition to being remote and inconsequentional. Foreign flag vessels which voluntarily engage in the trade of this nation subject themselves to our laws as they exist. United States' courts should not be intimidated into depriving crew members working for American companies from

vital rights under the LMRA because of vague apprehensions over incurring the displeasure of the Honduran government.

Neither flag law, nor treaty law, nor any other principle of international maritime law, is an obstacle to assertion of Board jurisdiction. The LMRA applies equally to foreign and American employers and employees who carry on business or work in this country.

Coverage under the LMRA will not impugn the Honduran nationality of the Empresa vessels or the right of Honduras to exercise the traditional authority of the flag nation in matters of registration, taxation, requisition, shipboard discipline, etc.

The alternative to Board jurisdiction is chaos, with state and federal district courts throughout the nation applying a multiplicity of variously shaded and conflicting views to the problem of union organizing in the foreign flag shipping field.

POINT I.

The Court of Appeals erred in granting an injunction against the Board election.

A. The district court lacked jurisdiction to entertain this suit.

It is well settled that Board orders in representation proceedings are not reviewable except as they may be drawn into question in unfair labor practice cases under Section 9(d) of the Act. *AFL* v. *National Labor Relations Board*, 308 U. S. 401 (1940).

Independent suits in district courts challenging Board determinations in representation cases have been permitted in only two very limited situations: (1) where a substantial

constitutional question is presented (*Fay* v. *Douds*, 172 F. 2d 720 (2d Cir. 1949); or (2) the Board's ruling is "contrary to a specific prohibition of the Act" (*Leedom* v. *Kyne*, 358 U. S. 184, 188 (1958). *Cf. Milkdrivers Local 98* v. *McCulloch* (D. C. Cir., No. 16695, May 31, 1962, not yet officially reported), 50 LRRM 2322.

Moreover, the right to bring independent suits in this narrow area has been restricted to unions alone, since employers without jeopardy can always under section 9(d) obtain review of unfavorable Board decisions in election cases by refusing to bargain. *Leedom* v. *Int'l Brotherhood of Elec. Wkrs.*, 278 F. 2d 237 (D. C. Cir. 1960); *Atlas Life Ins. Co.* v. *Leedom*, 284 F. 2d 231 (D. C. Cir. 1960); *Reeves* v. *Phillips* (N. D. Ga. No. 7818, Feb. 13, 1962, not officially reported), 49 LRRM 2833; *Lily Tulip Cup Corp.* v. *Leedom* (D. C. No. 1968-59, Aug. 4, 1959, not officially reported) 44 LRRM 2768.

The court of appeals' decision departs from prior cases in two respects: First, it would extend to employers the same right to bring independent suits as unions. (See also that court's most recent case, *Consolidated Edison Co.* v. *McLeod*, 303 F. 2d 354 (2nd Cir. 1962).) A conflict apparently exists between the District of Columbia Circuit and the Second Circuit on this point. *Leedom* v. *Int'l Brotherhood of Elec. Wkrs., supra; Atlas Life Ins. Co.* v. *Leedom, supra.*

Employers and unions were placed on equal footing by the Second Circuit because the court found it conceivable that the union in *Leedom* v. *Kyne* could have precipitated unfair labor practices and obtained review in that manner, and that did not deter this Court from deciding the case. The possibility that the union would have succeeded in fomenting unfair charges in *Leedom* v. *Kyne* was remote and unrealistic. This Court emphasized that the employees

there had "no other means within their control to protect and enforce" the right in issue (358 U. S. at 190).

Professor Henry M. Hart, who in the article, "The Supreme Court, 1958 Term," 73 *Harvard L. R.* 84, 219 (1958), apparently first suggested that unfair practice charges could have been incurred, recognized the unlikelihood. Ordinarily, when an employer refuses to bargain, a union can be counted upon with reasonable certainty to file refusal to bargain charges. The reverse is not true. If a union refuses to bargain, there are few employers who would find cause for complaint. Permitting employers to bring independent suits on the strained view that they stand in the same position as unions ignores the realities of collective bargaining and invites the delays and dilatory tactics which the statutory scheme was designed to prevent. (See the discussion of the legislative history of section 9 of the LMRA in the dissent of Mr. Justice Brennan in *Leedom v. Kyne*, 358 U. S. at 191.)

The second reason the decision of the court below is at odds with earlier cases is that despite the finding that Board action did not involve a violation of either constitutional rights or a "clear statutory command," the court nevertheless upheld the jurisdiction of the district court to review the Board proceedings. It did so by announcing an entirely new exception to the rule against independent suits in representation cases, namely, that district courts may intercede when Board action ramifies into the "field of foreign relations" or has "international aspects" (R. 68-69).

This far reaching exception for "international aspects" is very different from the exceptions permitted in *Fay v. Douds*, *supra*, or *Leedom v. Kyne*, *supra*, where courts intercede to protect existing constitutional or statutory

rights which are plainly in jeopardy. Here the circuit court's test for intercession is not rights to be protected, but rather the subject matter of the controversy before the Board. When "international aspects" are present, the Second Circuit now holds, the Board's primary authority to adjudicate the jurisdictional reach of the Act must yield to the district courts.

This is a drastic and we believe dangerous innovation in the traditional relationship between the Board, an independent administrative agency, and the courts, which has been marked by a policy of non-interference. From the earliest days of the Wagner Act, this Court has required that when proceedings are pending before the Board the administrative processes of the agency must be exhausted before there may be judicial review of the controversy, including questions of jurisdiction, and then such review is allowable only through the appropriate circuit court as provided in section 10(e) or (f) of the Act (29 U. S. C. §160(e) or (f)). *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938).

Under the "international aspects" test, parties dissatified with the way matters are progressing for them before the Board are invited to invoke the intervention of the district courts at almost any intermediate stage of Board proceedings, as Empresa did here.

Every district judge in the nation is thereby made a potential arbiter of Board jurisdiction in the foreign flag field. This will reduce to shambles the basic scheme of the LMRA wherein Congress to achieve a uniform national labor policy created the NLRB as a single paramount administrative or quasi-judicial authority to guide and regulate the development of federal labor law.

In *Amazon Cotton Mill* v. *Textile Workers Union*, 167 F. 2d 183, 185 (4th Cir. 1948), the Fourth Circuit remarked

on the havoc that would be wrought with the LMRA if the Act were deemed to have the "effect of clothing each of the more than two hundred district judges of the country with the powers over unfair labor practices vested in the National Labor Relations Board. ... ." This Court has many times sounded the same warning. In *Garner* v. *Teamsters, Chauffeurs & Helpers, etc.*, 346 U. S. 485 (1953) it observed that (at pp. 490-91):

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so."

The conflicts envisioned have already appeared in this case. The court of appeals in its opinion carefully refrained from deciding this case "on an all or nothing basis" (R. 69). It rejected as a fiction the notion that a foreign ship is a floating piece of the country whose flag it flies; and empha-

sized that in another case where the contacts of the vessel with the flag state were different, it might very well uphold Board jurisdiction (R. 69, 73, 82).

In *Sociedad Nacional De Marineros De Honduras* v. *McCulloch*, 201 F. Supp. 82 (D. C. 1962), Judge Holtzoff reached the "all or nothing" result with a sweeping decision that the Board did not have jurisdiction over foreign flag ships employing foreign seamen, and no qualifications were noted.

It may be argued that our contention that the district court lacked jurisdiction to entertain this suit is academic, since the companion suit by Sociedad in No. 107 raises the identical issue as to Board jurisdiction. And unlike Empresa, Sociedad is a labor union with no effective statutory method for seeking review. Our answer to this is that Sociedad by its conduct has waived any right to contest the Board's decision. Additionally, the initial action of the district court in accepting jurisdiction over Sociedad's suit could only have been based on the ground that overtones of foreign affairs were involved, and this, as we contend, is an insufficient basis for district court intervention in NLRB election cases.

Prior to rendering its decision in this case, the Board made a special separate request of Sociedad to intervene and state its position (R. 17). Sociedad ignored the Board, making no response at all to the request (R. 17). Then, displeased with the Board's eventual decision, on the very last day before commencement of the election, Sociedad appeared in the District Court for the District of Columbia seeking a stay of the entire proceedings.

A litigant that disdains to appear before an administrative agency and exhaust the administrative remedies available to it, should properly be held to waive whatever right it may have to make a collateral attack in the courts

on agency action. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). If Sociedad had been willing to participate in the election, as it had every opportunity to do, and was successful, this entire litigation would be moot. *United Brick & Clay Workers* v. *Junction City Clay Co.*, 158 F. 2d 552 (6th Cir. 1946); *Madden* v. *Brotherhood and Union of Transit Employees*, 147 F. 2d 439 (4th Cir. 1945). *Vapor Blast Manufacturing Company* v. *Madden*, 280 F. 2d 205 (7th Cir. 1960).

B. The court of appeals failed to accord to the Board's findings the weight and respect to which they are entitled.

Section 10(a) of the Act empowers the Board to prevent unfair labor practices "affecting commerce." Section 2(6) defines commerce as "trade, traffic, commerce, transportation or communication . . . between any foreign country and any State. . . ." Section 2(7) defines "affecting commerce" to mean "in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute. . . ." There is no question, as the court below acknowledged, that the shipping activities involved readily come within the Act's jurisdictional definitions of "commerce" and "affecting commerce." The issue confronting the Board then, as it noted in *West India Fruit & SS. Co.*, 130 NLRB 343 (1961), was not whether there was any jurisdictional basis for applying the Act, but rather "whether certain attendant circumstances" should be held to limit or bar application.

Resolving this type of issue obviously demanded of the Board the exercise of its experienced judgment and informed discretion in the very specialized field of federal labor relations. Board decisions of this character have been held by this Court to be entitled to "great weight"

and respect from a reviewing court. *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678 (1944); *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944); *Packard Motor Co.* v. *NLRB*, 330 U. S. 485 (1947); *NLRB* v. *E. C. Atkins & Co.*, 331 U. S. 398, 403-404, 414 (1947); *Universal Camera* v. *NLRB*, 340 U. S. 476, 488 (1951).

In *NLRB* v. *E. C. Atkins & Co., supra*, this Court noted that it was "elementary" that the Board had the duty in the first instance of determining who are employees and employers subject to the coverage of the Act. In making this determination, the Board "must bring to its task an appreciation of the economic realities, as well as a recognition of the aims which Congress sought to achieve by the statute. . . . It is free to take account of the more relevant economic and statutory considerations. And a determination by the Board based in whole or in part upon those considerations is entitled to great respect by a reviewing court, due to the Board's familiarity with the problems and its experience in the administration of the Act."

This Court further stated in *E. C. Atkins & Co.* that the "responsibility" for representing the "public interest" lies primarily with the Board, and "in the absence of some compelling evidence that the Board has failed to measure up to its responsibility, courts should be reluctant to overturn the considered judgment of the Board and to substitute their own ideas of the public interest."

In the field of foreign flag shipping the Board has measured up to its responsibility in the finest traditions of an independent administrative agency. Its acknowledged expertise and specialized experience have been brought to bear on the problem in thorough deliberations marked by scholarship and sensitivity to the issues. The opinion

in its leading case, *West India Fruit & S.S. Co.*, 130 NLRB 343 (1961), is one of its outstanding opinions and speaks for itself as to the quality of the vision with which the Board has fulfilled its statutory functions.

Faithfully following the guide lines set down by this Court in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953), and reaffirmed in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959), the Board conceives of its task as " 'ascertaining and valuing points of contact between the transaction and the governments whose competing laws are involved' and by 'weighing . . . the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority' " (130 NLRB at 354). In *Lauritzen*, as the Board observed, this Court was concerned with application of the Jones Act (46 U. S. C. §688) involving claims for personal injury by seamen. The contacts enumerated there naturally reflect the problems arising under that statute. Other statutes require emphasis of other contacts. In *Romero* v. *International Terminal Operating Co.*, *supra*, this Court, while reaffirming the contacts criteria of *Lauritzen*, significantly admonished that "due regard must be had for the differing interest advanced by the varied aspects of maritime law . . ." (358 U. S. at 382).

We are dealing here with a labor statute primarily designed to protect the commerce of this nation, and which depends for its jurisdiction upon that commerce. "Where the Labor Act is involved," said the Board in *West India*, " 'foreign commerce of the United States' is both an important and necessary contact within the intent of *Lauritzen*" (130 NLRB at 354).

With this formulation of the problem, the Board, in determining whether a particular foreign flag ship is subject to the provisions of the Act, has naturally looked at tangible operational facts. What the vessel does, where it goes and for whom it operates have been matters of important concern to the Board. The nationality of the flag or the crewmembers, or the domicile of the corporation holding nominal title to the vessel, are factors which, while they have not beeen overlooked by the Board, have been assigned their proper weight in the general reckoning. As the Board stated in this case:

> "The problem is one of evaluating the many aspects of the operation and determining whether or not the shipping involved is essentially that of this nation and not that of a foreign nation which the exigencies of international trade have brought in contact with the United States" (R. 11).

In *West India* the Board held that it had jurisdiction because the vessel engaged in substantial continuing American foreign commerce for an American employer. In this case, the Board, on the basis of the record compiled at the hearing, emphasized the functional facts of United Fruit's maritime operations in which Empresa was clearly revealed as a controlled instrumentality through which United Fruit met its requirements for waterborne transportation to American markets.

The court below, lacking the benefit of the record of the hearing, tended to brush aside United Fruit's predominant role and the fact that we are dealing here with a United States enterprise entrenched in the commerce of this nation. It stressed the Honduran contacts of the vessels, all of which are essentially formalistic or peripheral in character and reveal nothing concerning the real nature

of the business in which the vessels are engaged. Thus, the court pointed to the Honduran flag, the Honduran incorporation of Empresa, the Honduran citizenship of the crew and their employment in Honduras, the visits of the vessels to Honduran ports, and the past contractual relations between Empresa and Sociedad (R. 77). Beyond this, the factor which weighed heavily with the court was its apprehension that application of the Act to Empresa's vessels would have an extraterritorial effect that could involve conflicts with Honduran laws.

The remainder of this brief is devoted to a consideration of these and other objections to Board jurisdiction.

C. Board jurisdiction would not constitute an unwarranted extraterritorial application of the LMRA.

1. Empresa is an American operation.

Application of the LMRA to the Empresa vessels, operated as they are by an American company, in United States commerce, cannot realistically be viewed as an extraterritorial extension of the statute. The ancient conceptualism that a Honduran flag ship is a floating piece of Honduran territory was discarded long ago. *Cunard SS. Co.* v. *Mellon*, 262 U. S. 100, 123-124 (1923); *Scharrenberg* v. *Dollar SS. Co.*, 245 U. S. 122, 127 (1917); *Wildenhus' Case*, 120 U. S. 1 (1887).

That the vessels regularly depart the territorial waters of the United States and voyage in international waters or in the territorial waters of foreign countries, including Honduras, does not change the fact that they are still engaged in the foreign commerce of this country. They go to the same places, and they operate in the same service, under the same direction and control, as United Fruit's

American flag vessels, which are admittedly subject to the Act. There being no functional basis for disparate application of the Act, it cannot otherwise be justified unless the flag is said to make all the difference.

To exempt the Empresa vessels from obligations under the LMRA simply because they fly the Honduran flag is to do much more than accord traditional respect to the foreign flag of a friendly nation, it is rendering abject obeisance and servile homage to the myth of a foreign power within the boundaries of our own country.

The critical mistake of the court below was its rejection of the Board's key finding that the Empresa vessels operate as a phase of a United States enterprise. Having chosen to disregard this, the court at the outset of its discussion of the underlying jurisdictional issue, concluded that labor relations on the vessels were the "primary concern" of Honduras (R. 73). It repeated the conclusion later on in its opinion (R. 77). If one starts with the ultimate assumption that labor relations are the primary concern of Honduras, and couples this with a rejection of the finding that the vessels function as an integral part of a United States enterprise in which an American company is a co-employer (R. 62), then one naturally ends by holding the LMRA to be inapplicable. We believe that the record overwhelmingly supports the Board's findings as to the singleness of the United Fruit-Empresa undertaking, and the findings should not have been so lightly overlooked.

2. The jurisdictional reach of the LMRA which is determined by the "effects test" does not stop at the boundary lines of this nation.

Assuming that the Empresa vessels are extraterritorial entities of some sort, it still does not follow that they are immune from the LMRA. For there can be no question that in regulating commerce Congress can and has extended

the reach of our laws beyond the geographical boundaries of the nation.

Thus, in *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 287 (1952), which involved extraterritorial application of the Lanaham Trade Mark Act (15 U. S. C. §1051 *et seq.*), this Court stated that it did not matter that:

> "Petitioner affixed the mark 'Bulova' in Mexico City rather than here, or that his purchase of supplies in the United States to be used in his Mexico business when viewed in isolation do not violate any of our laws. They were essential steps in the course of business consummated abroad; acts in themselves legal lose that character when they become part of an unlawful scheme. 'In such a case it is not material that the source of the forbidden effects upon commerce arise in one phase or another of that program.' *Manderville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 237. In sum we do not think that Petitioner by so simple a device can evade the thrust of the laws of the United States in a privileged sanctuary beyond our borders."

Perhaps the best known line of cases giving extraterritorial effect to United States laws are those involving the antitrust laws: *United States* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927); *Thomsen* v. *Cayser*, 243 U. S. 66 (1917); *United States* v. *Aluminum Co.*, 148 F. 2d 416, 444 (2nd Cir. 1945); *Vanity Fair Mills, Inc.* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633 (2nd Cir. 1956); *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 309 (E. D. Ohio 1949), aff'd with modifications not here relevant, 341 U. S. 593 (1951); *United States* v. *R. P. Oldham Co.*, 152 F. Supp. 818, 822 (N. D. Cal. 1957); *United States* v. *Imperial Chemical Indus., Ltd.*, 100 F. Supp. 504, 592 (S. D. N. Y. 1951); *United States* v. *R. P. Oldham Company*, 152 F. Supp. 818 (N. D. Cal. 1957).

In these cases, as in the *Steele* case, the application of our laws to conduct taking place in foreign territories is based on the prohibited *effects* of that conduct on the interstate and foreign commerce of this nation. In other words, when in regulatory legislation Congress establishes the "effects" upon United States commerce as the jurisdictional criterion, the courts do not hesitate to vindicate the Congressional purpose even where doing so may in a very limited and special sense require extraterritorial application of the statute.

In *Vanity Fair Mills, Inc.* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633, 641 (2nd Cir. 1956), the reach of the antitrust laws was delineated as follows:

> "While Congress has no power to regulate commerce in the Dominion of Canada, it does have power to regulate commerce 'with foreign nations or among the several states.' This power is now generally interpreted to extend to all commerce, even in intrastate and entirely foreign commerce, which has a substantial effect on commerce between the states or between the United States and foreign countries. . . ."

In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 444 (2nd Cir. 1945), a contract made outside the United States by foreign parties and purporting to operate only outside the United States was condemned on the ground that it was intended to and did restrain the foreign trade of this country. The court stated:

> "Both agreements would clearly have been unlawful had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them."

There can be no question, as we have shown, that the fundamental objective of the Labor Act is to eliminate

practices which have the "effect of burdening or obstructing commerce," and "commerce" includes "trade . . . between any foreign country and any state. . . ." (29 U. S. C. 152(6)). Necessarily, therefore, Congress must have envisioned that regulation under the Act would include the foreign commerce of the United States and to that extent the Act would apply extraterritorially. Congress, as this Court has observed, undertook in the LMRA "to regulate all conduct having such consequences that constitutionally it can regulate." *Polish National Alliance* v. *NLRB*, 322 U. S. 643, 647 (1944); *NLRB* v. *Fainblatt*, 306 U. S. 601, 607 (1939). And ". . . it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion [for determining jurisdictional coverage of the Act]" *Edison Co.* v. *Labor Board*, 305 U. S. 197, 222 (1938).

For this reason, the canon of construction upon which the court below relied which favors interpretation of Congressional enactments to apply only within the territorial limits of the United States is inapplicable (*Foley Bros. Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949)). For as this Court stated in *Foley Bros.*, application of the canon is a "valid approach" in ascertaining "unexpressed" Congressional intent. But in the Labor Act, Congress has expressed its intent that the Act apply to both the domestic and foreign commerce of the nation to the end that certain deleterious effects on that commerce may be eliminated.

Comparison of the jurisdictional provisions of the Eight Hour Law, which was involved in *Foley Bros.*, with those of the Labor Act, highlight the reasons why the canon of construction was applicable there but not here. The Eight Hour Law (40 U. S. C. §325(a)) provides that the "wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract

[between the United States and private contractors] shall be computed on a basic day rate of eight hours. . . ." *Foley Bros.* held the law inapplicable to an American citizen working under such a contract in Iraq and Iran on the ground that it could not be presumed that the literally universal jurisdictional coverage extended the law's regulation to the working conditions of foreign nations.

In contrast to the literally universal coverage of the Eight Hour Law, the jurisdictional coverage of the LMRA is limited to the commerce defined. Moreover, under the Eight Hour Law coverage is determined by the status of the individual, i.e., employment by a contractor engaged in fulfilling a government contract. Under the LMRA, coverage turns on the *effects* on United States commerce. An employee could satisfy the literal jurisdictional requirements of the Eight Hour Law performing his entire service outside the territorial limits of this country, as was done in *Foley Bros.* For the Labor Act to be applicable, there must be trade between a foreign country and this country. Empresa's vessels regularly call at United States ports.

If the purpose of the LMRA to eliminate harmful effects on United States commerce is to be realized, the Act must in the metaphorical sense be applied extraterritorially in instances such as shipping, where the very business involved is a moving instrumentality of foreign commerce. The test for such application ought not to be the specious one of the ship-territory, but whether the contacts of a vessel with United States commerce are so substantial in comparison with its competing contacts with other nations as to justify the Board in asserting jurisdiction. This is precisely the view taken of the problem by the Board in *West India* (*supra*).

3. The possibility that application of the LMRA to Empresa vessels may conflict with Honduran laws is irrelevant, and the conflicts pointed to are inconsequential.

In view of the Congressional purpose to minimize obstructions on the flow of the foreign commerce of the United States, the possibility that application of the LMRA may have extraterritorial effects is irrelevant, and certainly does not justify the judicial rule that foreign flag shipping is totally exempt from coverage of the Act. As this Court stated in *Lauritzen* v. *Larsen*, 345 U. S. 571, 582-3 (1953):

> "We do not question the power of Congress to condition access to our ports by foreign-owned vessels upon submission to any liabilities it may consider good American policy to exact."

Similarly in *Marine Cooks & Stewards* v. *Panama S. S. Co.*, 362 U. S. 365, 372 (1960), this Court in upholding application of the Norris-LaGuardia Act to picketing by an American maritime union against a foreign flag ship, stated:

> ". . . a ship that voluntarily enters the territorial limits of this country subjects itself to our laws and jurisdiction as they exist."

While much emphasis has been placed on the potentiality of conflict between our laws and the laws of Honduras, if the Act is held applicable to Honduran flag ships, an examination of the complaint shows that the actual points of clash alluded to are of a vague and curious character, and whatever substance there is to them is left to surmise.

To begin with, paragraph "9" of the complaint (R. 3-4) summarizes several provisions of the Honduran merchant shipping law governing such items as the licensing of officers, and documents required to be carried by Honduran flag vessels. Clearly, application of the LMRA would in no

way interfere with Empresa's ability to comply with these and similar requirements of Honduran law. In *West India* (at 130 NLRB 357), the Board noted that "the courts have flatly told the Board that the rights guaranteed by the Act cannot be applied in such a fashion as to curtail the traditional authority which of necessity a master must exercise over his crew, or to relieve the crew individually or collectively of its traditional obligations and responsibilities to the ship, its officers and owners, including their obligation to respect such terms and conditions of employment as are specified in their existing shipping articles" (citing *Southern S. S. Co.* v. *NLRB*, 316 U. S. 31 (1949); *Texas Co.* v. *NLRB*, 120 F. 2d 186 (9th Cir. 1941); *Peninsular & Occidental S. S. Co.* v. *NLRB*, 98 F. 2d 411 (5th Cir. 1938); also *Rees et al.* v. *United States*, 95 F. 2d 784 (4th Cir. 1938).

Paragraphs "13," "14" and "15" of the complaint (R. 5) allege that the Ministry of Labor of Honduras has issued a ruling that the Board has violated the sovereignty of the Republic of Honduras; that under Honduran law Empresa is required to recognize Sociedad exclusively as bargaining agent for its seamen; and that NMU is forbidden to act as a union (presumably in Honduras only) because its juridic personality has not and cannot be recognized, since 90% of its members are not Honduran citizens.

The general conclusion of the Ministry of Labor that Honduras sovereignty has been violated is based mainly on the thoroughly discredited ship-territory dogma (R. 36-42). If this outworn cliché is deemed to defeat application of the Act to Honduran flag ships, it would of course have to be applied to the flags of all other foreign nations as well, and in one stroke would result in total renunciation by the Board of jurisdiction over every foreign-flag ship regardless of the relationship to the commerce of this nation.

United States shipping laws certainly regulate the employment relationship of American seamen on American flag ships equally as intensively as Honduran laws for Honduran flag ships (see, *e.g.*, 46 U. S. C. §§541-713). No difficulty has ever been experienced accommodating our shipping laws to the LMRA, and the result will be the same for Honduran laws, barring deliberate efforts by the government of Honduras to manufacture conflicts.

The allegation that under Honduran law Empresa is required to recognize Sociedad exclusively is a curious bit. Does this requirement hold for all times? If, in a secret ballot election, Empresa's seamen indicated a different preference—either NMU, Sindimar or "no union"—would Honduran law still require Empresa to recognize Sociedad to the exclusion of all other alternatives?

Finally, the insular and inhospitable 90% membership provision of Honduran law which would prevent NMU and every other non-Honduran union in the world from functioning in Honduras, is patently molded to immunize Panlibhon ship operators from the organizational activities of legitimate maritime unions. If the Board or the courts were to allow fear of encounter with this type of hostile legislation to preclude Board jurisdiction, then the hope of improving the working standards of Panlibhon seamen is indeed dim. In any event, the nature of the Empresa-United Fruit maritime operations, with vessels regularly calling at United States ports, renders it an easy matter for NMU to represent the seamen on the Honduran flag ships without ever setting foot in Honduras, precisely as NMU represents the seamen on United Fruit's American flag vessels. And if the affected seamen ever become dissatisfied with NMU's representation, they can always petition the Board for decertification, since under the LMRA no union can self-impose its domination for an indefinite period on unwilling employees.

Honduras cannot be prevented from enacting any type of repressive or discriminatory labor legislation it chooses. It may even frame laws deliberately aimed at creating conflicts with the LMRA, as it appears already to have done. The courts of our country should not be intimidated by this sort of international maritime politics.

We have nothing to be diffident about in extending the rights and protections of the LMRA to underpaid seamen employed in the commerce of this nation by an American company. Now they may designate a union of their own choice without fear of reprisal. The courts of this country would be yielding to shamefully aggressive and repugnant behavior if they permitted the rumblings of displeasure which have so far been heard from Panlibhon sources to pressure them into denying needy seamen the benefits of the LMRA.

Honduras might well profit from the example of equal and gracious treatment accorded a foreign labor union by the NLRB in *Hamilton Bros., Inc.*, 133 NLRB No. 85 (1961). There Sindimar petitioned the Board for an election on foreign flag ships operated by an American company which imported tropical produce. A total of eight ships were involved—six Honduran flag, one Nicaraguan and one American. The Board processed the petition and directed an election upon a showing by Sindimar of the required interest. We know of no complaint by the Republic of Honduras in that case that assertion of Board jurisdiction conflicted with Honduran laws.

In any event, in determining the jurisdictional reach of the LMRA, as the statute was enacted by Congress, the favor or disfavor of a foreign nation is hardly pertinent. If Congress were motivated by vague anxieties of retaliation, it would have long ago eschewed enactment of immigration, custom, health and safety laws.

Over the years, a constant stream of protest has been issuing forth from foreign maritime nations critical of the various forms of regulation and control exercised by United States agencies over foreign flag shipping in our national interest. This protest has not deterred the enforcement of federal statutes, nor has it resulted in retaliation against United States flag shipping.

Examples chosen at random from the maritime pages of recent issues of the New York Times disclose such items as vigorous protest by Mexico against refusal of U. S. Coast Guard to permit a Mexican cruise ship to sail from New York harbor for safety reasons;[4] "concerted drive" by foreign nations against implementation of the Bonner Act by the Federal Maritime Commission, which is accused of seeking to regulate rate making and other practices of foreign flag shipowners in Europe as well as the United States;[5] announcement of Prime Minister Macmillan that he will use "any means, official or unofficial," to thwart efforts of the Federal Maritime Commission to regulate the affairs of foreign shipping conferences;[6] refusal of eight British shipping lines to produce documents subpoenaed by the Federal Maritime Commission;[7] charge by a Danish shipping concern that the United States' cargo preference laws are "balkanizing" the high seas.[8]

D. The LMRA, as recently amended, requires the Board to take jurisdiction over foreign flag ships.

In late 1959 Congress added section 14(c)1 (29 U. S. C. §164(c)1) to the LMRA, thereby requiring the Board

[4] New York Times, December 23, 1961, p. 1; January 7, 1962, p. 87.

[5] *Ibid.*, May 18, 1962, p. 62.

[6] *Ibid.*, May 9, 1962, p. 86.

[7] *Ibid.*, May 20, 1962, p. 73.

[8] *Ibid.*, July 7, 1962, p. 52.

to assert jurisdiction over foreign flag vessels whose substantial contacts with American commerce outweigh their contacts with the flag nation or any other nation. Section 14(c)1 reads as follows:

> ". . . the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

On May 23, 1958, the Board had asserted jurisdiction over two Liberian flag ships which sailed between the United States and Cuba. *Peninsular & Occidental SS Co.*, 120 NLRB 1097 (1958). On December 11, 1958, the Board issued a decision that it would assert jurisdiction over all "freight transportation enterprises engaged in the furnishing of interstate transportation services . . . which derive at least $50,000 gross revenues per annum from such operations . . ." *HPO Service, Inc.*, 122 NLRB 394, 395 (1958). Congress presumably had knowledge of these cases when it enacted section 14(c)1.

Moreover, Congress was well aware of the rapid growth of flag of convenience fleets. *Hearings On Vessel Transfer, Trade-In, And Reserve Fleet Policies Before Committee On Merchant Marine, and Fisheries*, 85th Cong., H. R., 1st Sess. (1957). Indeed, almost contemporaneously with debate on the Landrum-Griffin amendments, the House Sub-Committee on Merchant Marine was holding hearings on foreign flag affiliations of subsidized American shipowners. *Hearing Before The Committee On Merchant Marine*, 86th Cong., H. R., 1st Sess. (1959).

While it is true that section 14(c)(1) was directed primarily at filling the no-man's land created by *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1 (1957), it is equally true that section 14(c)(1) involved perhaps the most

thorough and sweeping review of NLRB jurisdiction since the Board was created by the Wagner Act. It is a fair inference that in considering passage of this section Congress had before it the limits to which, up until that time, the Board had asserted its jurisdiction. We submit, accordingly, the Congressional failure to exclude from coverage of section 14(c)(1) flag of convenience ships represents recognition of the appropriateness of the assertion of jurisdiction in *Peninsular & Occidental, supra,* and is therefore authority for the assertion of jurisdiction in this case.

E. The Honduran flag is no bar to Board jurisdiction.

There is no question, as the Board observed in *West India,* that: "The United States with other maritime nations of the world, has as a principle of comity accepted the general maritime law, including the flag law doctrine . . ." (130 NLRB at 353). Under this doctrine, nationality of a ship is evidenced by its papers and flag, the registering country determines for itself the "conditions on which it will grant nationality to a merchant ship," and only the registering country can question the validity of a registration. There is no doubt also that the registering country acquires various aspects of authority over the vessel. *Lauritzen* v. *Larsen,* 345 U. S. 571, 584 (1953).

But all this has never been deemed to impose any limitation on the sovereign powers of Congress to legislate with respect to foreign flag vessels engaged in the commerce of this nation. As a matter of comity, the reach of our laws has at times been restricted to American flag vessels. But this is only a matter of comity and implies no inherent limitations on Congressional authority. *Lauritzen* v. *Larsen, supra; Wildenhus' Case,* 120 U. S. 1 (1887). . .

As earlier noted, in *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U. S. 365 (1960), this Court applied the Norris-LaGuardia Act to picketing of a foreign flag ship by an American maritime union. Recently, in *Bowater Steamship Co.* v. *Patterson*, 303 F. 2d 369 (2d Cir. 1962), the Second Circuit applied the Norris-LaGuardia Act to picketing in Buffalo, New York of a British flag vessel by a Newfoundland union over a labor dispute which had arisen in Newfoundland.

The Jones Act has in a number of cases been applied to accidents occurring in international waters on foreign flag ships including two belonging to United Fruit, *i.e.*: *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927 (2d Cir. 1932), *cert. den.*, 287 U. S. 642 (1932); *Zielinski* v. *Empresa Hondurena de Vapores*, 113 F. Supp. 93 (S. D. N. Y. 1952)—this despite the fact that in *Zielinski*, as here, Article 10 of the ship's articles expressly provided that a claim for personal injuries "shall be governed and determined exclusively by the laws of the Republic of Honduras . . ." (Empresa Ex. 24, S. M. 580).

Other cases holding the Jones Act applicable to foreign flag ships are: *Gambera* v. *Bergoty*, 132 F. 2d 414 (2d Cir. 1942), *cert. den.*, 319 U. S. 742 (1943); *Rodriguez* v. *Solar Shipping, Ltd.*, 169 F. Supp. 79 (S. D. N. Y. 1958); *Carroll* v. *United States*, 133 F. 2d 690 (2d Cir. 1943); *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437 (2d Cir. 1959); *Babolakis* v. *Compania Panamena Maritima San Gerassimo*, 168 F. Supp. 236, 238 (S. D. N. Y. 1958).

In *Gerradin* v. *United Fruit Co.*, *supra*, the Second Circuit in holding the Jones Act inapplicable to an American owned foreign flag vessel refused to be stymied by the "illusionary shield" of foreign registry:

> "If defendants' contention be sound, American owners and chartered owners of vessels can escape liability to American seamen employed on their ships by procuring registry under a foreign flag. We feel

> little doubt that the broad contention of the defendant that vessels of the American merchant marine are limited to those documented under the laws of the United States is not well founded" (at p. 927).
>
> . . . . .
>
> "(I)t seems but a slight disregard of the symbol of foreign registry to apply an ordinary rule of torts to a ship owner who bears such an illusionary shield (at p. 929).

In *Bobolakis* v. *Compania Panamena Maritima San Gerassimo, S. A., supra*, Judge Irving Kaufman warned that the courts will not be "baffled" by the paper corporate manipulations of Panlibhon ship operators.

> "... under the view pressed by Compania, an American owner might escape his statutory liability merely by interposing a foreign corporation between himself and the vessel, both of which, for all practical purposes, he owns. I do not believe that the law can be so easily baffled."

In *Navios Corp.* v. *National Maritime Union of America*, 402 Pa. 325, 338-339 (1960), *cert. den.*, 366 U. S. 905 (1961), the Pennsylvania Supreme Court, in holding that the question of the LMRA's coverage of foreign flag shipping was arguable and therefore within the exclusive competence of the NLRB, underscored the relevancy of Jones Act cases to the problem:

> "The appellants point out that it is the policy of the United States government to recognize 'a vessel's foreign 'flag of convenience.' Since, however, this policy does not deter the federal courts from looking behind such flags in cases involving federal regulatory statutes like the Jones Act, for instance, it may reasonably be inferred that neither should it

deter the NLRB from looking behind such flags in cases involving the LMRA."

In addition to the Jones Act, the following wage provisions of the Merchant Seamen's Act have also been held applicable to foreign flag ships despite the absence in the statutory language of any clear expression of Congressional intent that this be done:

> 46 U. S. C. §593: Dealing with payment of seamen's wages upon loss or wreck of a vessel. *Avgoustis* v. *Erini Shipping Co.*, 177 F. 2d 461 (2d Cir. 1949);
>
> 46 U. S. C. §594: Providing for payment of seamen's wages in case of improper discharge. *Avgoustis* v. *Erini Shipping Co., supra;*
>
> 46 U. S. C. §596: Fixing the time for payment of seamen's wages upon termination of employment. *The Flatero* v. *Arias,* 206 F. 2d 267, 274 (4th Cir. 1953); *The Sonderborg,* 47 F. 2d 723 (4th Cir. 1931).

Similarly, the section in the federal shipping code providing for limitation of an owner's liability in the event of loss or damage to a vessel, as originally enacted (9 Stat. 635 (1851)), did not contain any express reference to foreign flag vessels but was nevertheless held applicable to them. *The Scotland,* 105 U. S. 24 (1882). Subsequently this section was amended to refer to foreign flag vessels expressly, but this in no way reflected on decisions prior to the amendment (49 Stat. 960, 46 U. S. C. §183 (1935)).

Earlier we pointed out that as required by the Shipping Act (*supra* p. 11) United Fruit files annual reports with the United States Maritime Commission which include details on its foreign flag vessels. The Merchant Marine Act of 1936, 64 Stat. 773 (1950), 46 U. S. C. 1283 contains a provision dealing with war risk insurance which provides (46 U. S. C. §1283):

"The Secretary may provide the insurance and reinsurance authorized by Sec. 1282 of this Title with respect to the following persons, party or interest:

"(a) American vessels, including vessels under construction, foreign flag vessels owned by citizens of the United States or engaged in transportation in the waterborne commerce of the United States or in such other transportation by water or such other services as may be deemed by the Secretary to be in the interest of the national defense or national economy of the United States when so engaged."

Significantly, the collective bargaining agreement between Empresa and Sociedad calls for war risk insurance as contemplated in the Merchant Marine Act of 1936 (R. 33-34).

In short, when foreign flag vessels operate in the commerce of this country, this country shares authority over such vessels with the flag state. The extent to which this country will assert such authority depends on a number of factors including the circumstances of the vessels' operations, the matter to be regulated, and the applicable statute. If the flag alone were the governing consideration, there would have been no need for this Court in *Lauritzen* to have enumerated contact points and connecting factors other than the flag.

In 1960, the then Attorney General rejected the flag-law-governs-all argument, although opposing Board jurisdiction in *West India*, this case, *Peninsula & Occidental Steamship Co*, 132 NLRB 10 (1961); and *Eastern Shipping Corp.*, 132 NLRB 930 (1961). As intervenor on behalf of the Departments of Defense and State in the consolidated hearing convened by the Board in those cases (R. 9), the Attorney General enumerated certain principles

which he urged the Board to apply in determining whether a particular vessel and its crew were subject to the Act. One of these principles would require jurisdiction to be upheld, regardless of the flag of a vessel, wherever an American owner sought to evade his contractual obligations to an American union by foreign registry. This principle presupposes Board jurisdiction over at least some foreign flag vessels.

While *Lauritzen* nominally attached "cardinal importance to the law of the flag," it nevertheless recognized that other contact points could outweigh the flag and expressly approved earlier Jones Act cases where the courts "pressed beyond the formalities of more or less nominal foreign registration" to enforce the obligations of "our law" (345 U. S. at 587).

Additionally, as the Board emphasized in *West India*, *Lauritzen* dealt with the Jones Act, and the contacts enumerated there reflect the problems arising under that statute. Other laws require emphasis of other contacts. "Where the Labor Act is involved," said the Board, " 'foreign commerce of the United States' is both an important and necessary contact within the intent of *Lauritzen*" (130 NLRB at 354).

Clearly, therefore, the naked fact that Empresa's vessels fly the Honduran flag is no bar to Board jurisdiction.

F. Application of the Labor Act to Empresa's vessels will not detract from their Honduran nationality.

Related to the claim of absolute flag supremacy is Empresa's further contention that assertion of Board jurisdiction will somehow impugn the Honduran nationality of its vessels and thereby infringe the sovereignty of Honduras. The Board in *West India* expressly disavowed

any such intention, stating that it accepted "without question" the Liberian nationality of the vessel involved in that case and the paramount authority of Liberia over it (130 NLRB at 359):

> "The issue is whether the Liberian nationality of the vessel, *which we accept without question*, divests the Board of that jurisdiction it would have but for that foreign nationality. In finding that it does not, *we are not divesting or attempting to divest Liberia as the flag state of its paramount rights, for example, to control the movement of, to requisition, or to tax the vessel.* But there is nothing inconsistent between our recognizing the foreign nationality of a foreign flag vessel, and the application of the Act in those situations where the foreign state in effect permits its vessel to be operated as an integral part of an essentially domestic enterprise engaged in a continuing and immediate manner in both the foreign and domestic commerce of this nation" (italics added).

Thus, while the vessels involved in this proceeding are at sea, Honduran law would determine the citizenship of a newborn child, or the legality of a will, or business contract. Honduras would similarly retain its authority to deal with crimes or disciplinary problems aboard the vessels. More important, Honduras' authority to tax the vessels, requisition them, control their registration, fix standards of competence for unlicensed seamen and officers would all remain unaffected.

The nationality of a vessel is certainly no more sacred than the nationality of an individual. An alien visiting or doing business in this country is subject to our laws without his nationality being called into question. The same principle applies to foreign flag vessels which engage extensively, if not exclusively, in the commerce of this country.

As has been authoritatively recognized, while a vessel's nationality may be "conclusively" determined by its flag, this does not prevent another nation from exercising authority or "shared competence" over it, where its operations have substantial effects on the welfare of the other nation, even though these effects do not occur or are not felt "entirely within" the boundaries of the other nation. A nation may "quite lawfully apply its authority to ships to which other states have attributed national character, just as it may to individuals and corporations bearing the nationality of other states." McDougal, Burke and Vlasic, "The Maintenance of Public Order at Sea and the Nationality of Ships," 54 *Am. J. of Int'l Law* 25, 54-55 (1960).

This is of particular importance for Panlibhon shipping, where the interests of the United States may be far superior to that of any other country. Most Panlibhon vessels involve the interests of at least two nations. Empresa's fleet is a perfect illustration of this. For here we have Honduran flag ships ultimately owned by an American company and operated as a part of its United States business.

The Board pointed out in *West India* that Panama, Liberia and Honduras have acquiesced in an arrangement whereby the United States has secured pledges from American owners of Panlibhon ships to make them available for requisition by this country in time of national emergency (130 NLRB at 364-5). This alleged "effective control" by the United States applies even to Panlibhon ships built in recent years that have never sailed under United States flag. If this country can reserve to itself the paramount right of requisition over much of Panlibhon shipping, there

obviously is nothing left to the claim of exclusive authority for the flag nation.

A timely example of the point made here is found in a front page news story in The New York Times of October 4, 1962. The United States is reported to have "decided on drastic unilateral steps to try to prevent American, allied and neutral shipping from carrying Soviet-bloc supplies to Cuba." Among other things, President Kennedy will announce orders prohibiting "United States-owned ships sailing under foreign registry from participating in the Cuban trade." Any other foreign flag ships carrying munitions to Cuba will be "barred indefinitely from United States ports."

G. The internal order rule does not bar assertion of Board jurisdiction.

Empresa may argue that application of the Labor Act to its vessels would affect their internal order which is subject to exclusive regulation by the flag state. In *West India* the Board concluded, and we agree, that the internal order rule "is but a part of the broader flag law doctrine. . . ." If flag law does not foreclose Board jurisdiction, then the internal order rule which is but a segment of flag law, could not have that effect. This finds support in *Lauritzen* where internal order was included in the discussion of flag law generally.

But even if internal order is considered apart from overall flag law no different result is reached. The classic formulation of the internal order rule is found in *Wildenhus's Case*, 120 U. S. 1, 12 (1887), where it was described as reaching "all matters of discipline and all things done on board which affected *only* the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port. . . ." (italics added). In

Urivac v. *Jarka Co.*, 282 U. S. 234, 240 (1934), it was indicated that internal order embraces "discipline and private matters that do not interest the territorial power."

From this we see, as the Board pointed out in *West India*, that the internal order doctrine is limited to those events which affect only the internal affairs of a vessel. This plainly renders the doctrine inapplicable to this case. Here we are dealing with a fleet of vessels which have a substantial and continuing connection with the commerce of this nation.

Apart from these considerations, the Board correctly held in *West India* that application of the Act to sea borne commerce does not involve any interference with the internal order of a vessel. To begin with, the internal order doctrine was "developed and acquired its meaning more than a hundred years ago—that is, at a time when the rights and obligations created by the Act were unknown at law" (130 NLRB at 357).

Moreover, as the Board has observed, assertion of jurisdiction will not in actual effect interfere in any way with the internal order and discipline aboard the vessels. Empresa would, of course, be obligated to bargain with NMU under the Labor Act. But the Act does not require the inclusion of any specific terms in an agreement or the reaching of any specific agreement at all so long as there is bargaining in good faith. As this Court pointed out in *NLRB* v. *Insurance Agents International Union*, 361 U. S. 477, 488 (1960):

> "Congress [in enacting the Labor Act] intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."

The Act, in other words, encourages private collective bargaining and any agreement reached is the private agree-

ment of the parties, and the internal order doctrine has no application to private action. The crewmembers of Empresa vessels presently work under the terms of a private collective bargaining agreement with Sociedad. Certainly a private collective bargaining agreement with NMU would not constitute interference with the internal order of the vessels—or at least not the type which the doctrine was classically or practically designed to prevent.

H. The Honduran incorporation of Empresa and the non-resident alien status of the crew are no bar to Board jurisdiction.

Neither the Board nor the courts in applying the Labor Act have ever discriminated between foreign or domestic corporations, or between alien or American workers so long as the activities of the foreign corporations and the alien workers are in the commerce of this nation. *Logan and Paxton*, 55 NLRB 310, 315, n. 12 (1944); *Italia Societa per Azioni di Navigazione*, 118 NLRB 1113 (1957); *Brown-Company*, 109 NLRB 173 (1954).

Further, the fact that the crewmembers are nonresidents is of no consequence. Empresa's vessels regularly visit this country. During such visits the crewmembers are working in this country to the same extent as the many nonresident aliens transiently employed here over which the Board has consistently and customarily asserted jurisdiction. *Italia Societa per Azioni di Navigazione, supra; Brown Company, supra.*

These crewmembers, as the Board noted in *West India*, are "at all times . . . working within the foreign commerce of this nation. . . . [I]t would be anomalous at best to base jurisdiction upon the citizenship and residence of the parties involved, rather than upon their relationship to the

protected commerce of this nation. Surely, a labor dispute involving the *Sea Level* would affect American commerce neither more nor less because the crew is foreign rather than American" (130 NLRB at 360-361).

Nor does the fact that a majority of the crewmembers were hired in Honduras make any difference. Wherever hired, they work in the commerce of this country for an American company. This company cannot escape obligations to its employees under the LMRA by hiring them abroad. As this Court stated in *Cunard SS. Co.* v. *Mellon*, 262 U. S. 100, 125 (1925), quoting the words of Chief Justice Marshall in *The Exchange*, 7 Cranch. 116, 144:

> "'When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country.'"

I. The assertion of jurisdiction by the Board will not infringe treaty obligations of the United States with Honduras.

Empresa, careful to cite only a single paragraph of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras, 45 Stat. 2618 (1927), i.e., Article 10, would have the Court read the Treaty as embodying a form of "yellow dog" compact immunizing Honduran flag shipping from

the jurisdiction of the Board and the organizational activities of American maritime unions generally. However, the treaty, far from presenting obstacles to Board jurisdiction, actually authorizes it. Article 10 sets forth the unchallenged truism that a vessel's flag determines its nationality. However, as we have shown (*supra*, p. 47), and the Board held in *West India*, alien status is no obstacle to application of the Act.

The court below also referred to Article 22 of the treaty without drawing any conclusions as to its significance (R. 63, 80). We read Article 22 to support Board jurisdiction. It provides:

> "A consular officer shall have exclusive jurisdiction over the controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases wherever arising between officers and crews pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over the issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit."

As can be seen, the first sentence of Article 22 grants to a consular officer exclusive jurisdiction over controversies arising out of the "internal order" of vessels and "pertaining to the enforcement of discipline on board." This supports our prior contention that "internal order" is limited to minor shipboard incidents including discipline and related matters. The reasons we discussed against acceptance generally of the internal order doctrine as precluding Board jurisdiction (*supra*, pp. 45-47), apply with

equal force against acceptance of the doctrine through the medium of the treaty.

The second sentence of Article 22 dealing with "wages and the execution of contracts relating thereto," eliminates the consular officer's exclusive jurisdiction and provides in effect that he shall have concurrent jurisdiction with United States authorities and then only to the extent permitted by "local laws." If a vessel's internal order does not encompass jurisdiction over wages and contracts relating thereto, and local laws are applicable, then plainly the LMRA is one such local law and the jurisdiction of the NLRB is confirmed.

The remainder of the treaty codifies a civilized program for co-existence of friendly nations "responsive to the spiritual, cultural, economic and commercial aspirations" of the nationals of each state (45 Stat. at 2618). To this end, the treaty provides that the nationals of one of the "contracting" countries when in the territorial jurisdiction of the other shall enjoy specified rights and privileges. At best these rights and privileges are equal to those enjoyed by resident nationals. At least they are equal to those enjoyed by the nationals of the most favored nation.

This means that Empresa, granting it to be a full-fledged Honduran national, when engaged in the commerce of this nation, enjoys no higher prerogatives, no more exalted status than American ship operators. Empresa is subject to the same obligations under the LMRA and the same free play of private economic forces in the American economy—including the organizing activities of American maritime unions. Federal District Judge Frederick van Pelt Bryan, in *Afran Transport Company* v. *National Maritime Union*, 169 F. Supp. 416, 422, n. 1 (S. D. N. Y. 1959), cited with approval by this Court in *Marine Cooks &*

Stewards (362 U. S. at 365), recognized the inapplicability of the Treaty of Friendship with Liberia, which is almost identical to the treaty with Honduras, with respect to the organizing rights of American maritime unions:

> "At the outset it should be noted that the Treaty between the United States and the Republic of Liberia which is relied on by the Liberian plaintiffs does not confer upon them or upon their vessels any greater rights than those of American corporations or vessels. It goes no further than to place them on a parity with American corporations and vessels in the respects enumerated by the treaty."

J. The *Benz* case does not bar assertion of Board jurisdiction.

We have no quarrel with this Court's holding in *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U. S. 138 (1958). We urge however that *Benz* does not rule out application of the Labor Act to all foreign flag ships regardless of the circumstances of their operations. *Benz* was rejected as a conclusive bar to Board jurisdiction by the New York Court of Appeals in *Incres Steamship Co., Ltd. v. International Maritime Workers Union*, 10 N. Y. 2d 218 (1961); the Pennsylvania Supreme Court in *Navios Corp. v. National Maritime Union*, 402 Pa. 325, 332 (1960); the Federal District Court in *Afran Transport Co. v. National Maritime Union*, 169 F. Supp. 416, 424-5 (S. D. N. Y. 1958); the NLRB in *West India Fruit & SS. Co.*, 130 NLRB 343, 361-364 (1960) and subsequent foreign flag cases; and even by the court below which held that the issue of LMRA coverage for foreign flag ships could not be decided on an all or nothing basis.

We disagree with the court below that *Benz* weighs against application of the Act in this case. To be sure,

Benz did hold the Act inapplicable to a dispute arising on a foreign flag ship operated by a foreign crew under foreign articles which "erupted" while the vessel happened "temporarily" to be in an American port. *Benz* involved a foreign tramp steamer, which, after one or two fleeting and haphazard contacts with an American port, became embroiled in a labor dispute between the master and crew in which American labor unions thereafter joined as partisans of the crew. After picketing was enjoined, the vessel sailed away and two years later had not touched an American port again. This Court stressed in its opinion the happenstance and fortuitous quality of the vessel's American contacts stating (353 U. S. at 142):

> "The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing."

The distinctive feature of *Benz* that the vessel there had only a "temporary" or "transient" connection with an American port has been repeatedly recognized (*Incres SS. Co., supra; Afran Transport Co., supra; Navios Corp., supra).*

In *Marine Cooks & Stewards* v. *Panama SS. Co.*, 362 U. S. 365, 369 (1960), this Court underscored this limitation of the *Benz* holding:

> "The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happended temporarily to be in American waters."

Benz hardly warrants the conclusion that coverage of the Act is barred where, as here, Empresa's vessels operate

extensively, if not exclusively, in United States commerce as an integral part of an American business. As this Court has admonished, "words of our opinions are to be read in the light of the facts of the case under discussion. . . . General expressions transposed to other facts are often misleading." *Armour & Co.* v. *Wantock*, 323 U. S. 126, 133 (1944).

Moreover, we do not read the generic reference in *Benz* to "American employers and employees" to mean that the Act is never applicable to foreign employers or employees who carry on their business in this country. When alien workers are employed by employers engaged in business in the United States, the aliens are, for the purposes of the Act, American workers, and they enjoy the same protection under the Act as citizen workers. By the same token, when an alien employer volitionally engages in the commerce of this nation, he should be bound by the same labor laws that apply to his American competitors. Congress could not have intended otherwise. Thus, the Act applies where an Italian ship operator employing alien workers engages in business in this country. *Italia Societa per Azioni di Navigazione*, 118 NLRB 1113 (1957).

We disagree completely with the court below that in one respect this is a weaker case than *Benz* for applying the Labor Act because in *Benz* the only issue was whether Section 303 of the Act was applicable, while here the whole panoply of labor regulation under sections 7, 8, 9 and 10 of the Act is in issue. In *Benz* the petitioners argued that the district court lacked jurisdiction of the controversy because the subject matter had been preempted by the LMRA. In holding that there was no preemption, the majority opinion obviously considered the Act in its entirety, and the rejection of the defense of preemption was not based on a single provision of the Act.

We are mindful that in *Benz* this Court stated that in its study of the Act it could find nothing either in the Act itself or in legislative history to indicate that Congress intended to cover foreign flag ships with foreign crews.

However, since the *Benz* case was decided, as we have already noted, Congress in a thorough and sweeping review of the scope of LMRA coverage added section 14(c)(1) and did not exclude foreign flag ships, although between the decision in the *Benz* case and the passage of section 14(c)(1) the Board had asserted jurisdiction over such vessels.

Moreover, it would have been unusual, to say the least, if the Act did contain an express inclusion for foreign flag ships. For the Act contains no express inclusions for any category of employer. The jurisdictional coverage of the Act, as we have shown, is based on the "effects test." The Act is a statute of general inclusion and only specific exclusion.

The fact that legislative history is vague and inconclusive hardly justifies the absolute judicial rule that the Act can never be applicable to any foreign flag ship with an alien crew. This is particularly so in view of the many strange and varied forms that flag of convenience shipping can take, and its devastating economic impact on American merchant seamen.

Moreover, such absolute rule would create the anomalous situation of this Court saying in *Marine Cooks* that American unions may picket on the waterfront to protest loss of jobs to Panlibhon shipping, but the facilities of the Board are not available to them to resolve the disputes peacefully.

The *Benz* case was decided before the Board had handed down any of its decisions in the foreign flag field, and this Court did not have the benefit of the Board's experience

and deliberations on the problem. The Board has recently decided six foreign flag shipping cases, *i.e.*: *West India Fruit and SS. Co.*, 130 NLRB 343, (1961); *Peninsular & Occidental Steamship Co.*, 132 NLRB 10 (1961); *Eastern Shipping Corp.*, 132 NLRB 930 (1961); *United Fruit Co.*, 134 NLRB No. 25 (1961); *Hamilton Bros.*, 133 NLRB No. 85 (1961); *Owens-Illinois Glass Co.*, 136 NLRB No. 32 (1962); *Dalzell Towing Company, Inc.*, 137 NLRB No. 48 (1962).

Each of these cases required of the Board what this Court described in *San Diego Building Trades* v. *Garmon*, 359 U. S. 236 (1959), as "*ad hoc* inquiry into the special problems of labor management relations involved in a particular set of occurrences" to determine the impact "on the entire scheme of federal labor policy and administration" (359 U. S. at 242). No uniform fact situation is discernible to which a generalized formula applies.

Foreign flag ships may be owned and controlled outright by American corporations (*West India, Hamilton Bros., and Owens-Illinois*), or they may be owned and controlled by American interests operating through nominal foreign corporations (*Peninsular & Occidental, United Fruit,* and *Dalzell*); or they may be owned by foreign interests and operated jointly through a foreign corporation and a domestic agency corporation (*Incres, Eastern*). The services engaged in by the vessels in each case similarly vary. They may operate as car ferries shuttling back and forth on short voyages between a United States port and a nearby foreign port (*West India*); they may carry passengers in the Caribbean cruise trade (*Peninsular & Occidental, Incres* and *Eastern*); they may engage in the banana boat trade (*United Fruit Co.* and *Hamilton Bros.*); they may tow barges loaded with pulpwood (*Owens-Illinois*);

or they may be held available for charter by anyone in the worldwide tramp market (*Dalzell*). The proceeding may come before the Board on the petition or charge of a foreign union (*Hamilton Bros.*), or an American union (*West India, Peninsular & Occidental, Eastern, United Fruit, Owens-Illinois, Dalzell*).

In its most recent foreign flag decision, *Dalzell Towing Company, Inc.*, 137 NLRB No. 48 (1962), the Board declined to assert jurisdiction over a Panamanian flag vessel even though it concluded that the vessel was operated as "essentially a domestic U. S. enterprise." The decision was based on the fact that the character of the shipping involved was determined by the business of the charterers rather than the business of the owner-operator, and the charterers could be anyone in the world charter market. Because of this "fortuitous element underlying the physical contacts of the vessel with the United States," the Board chose to "defer to the law of the flag."

From the foregoing review of recent Board decisions, we see that in each case the Board was called upon to assemble and evaluate a unique array of facts and reach a determination as to whether it was dealing with an essentially domestic enterprise or something else—or whether the foreign aspects of a particular case militated against the assertion of jurisdiction. We do not believe that this Court in *Benz* intended to impose prior restrictions on Board inquiry, nor has Board action exceeded any of the jurisdictional limitations for which *Benz* stands. If anything, the Board in *Dalzell* appears to have defined Board jurisdiction in much narrower terms than would seem permissible by *Benz*. The Board has been careful to emphasize in this case (R. 11) and in *Dalzell* that the fact that a vessel regularly calls at United States ports is not alone sufficient for coverage under the Act.

POINT II.

Board jurisdiction will assure a uniform federal maritime labor policy for foreign flag shipping and other beneficial results.

Only through the processes of the Board can a uniform peaceful solution be achieved to the labor problems of flag of convenience shipping. To deprive the Board of its rightful role in resolving the many and difficult issues in this sensitive area, is to invite a checkerboard pattern of resolution with decisions varying from court to court and jurisdiction to jurisdiction. A premium will be placed on forum shopping; and the result is bound to be confusion and unrest on the waterfront culminating in paralyzing strikes. Inability to reach agreement on the organizing rights of the maritime unions with respect to foreign-flag ships was a key issue in the 1961 nationwide maritime strike—a matter alluded to in the Court of Appeals' opinion (R. 80-81).

The court below would take from the Board and vest in the federal district courts overriding authority to determine the scope of the LMRA in the field of foreign commerce, including foreign flag shipping. This makes peculiarly apt the warning of this Court, which we earlier noted (*supra*, p. 19), that substitution of a multiplicity of tribunals, including federal courts, for single centralized administration by the NLRB is bound to breed a spate of variegated, incompatible and conflicting adjudications in a field where uniformity is most to be desired. *Garner* v. *Teamsters, Chauffeurs and Helpers, etc.*, 346 U. S. 485 (1953).

As an administrative agency with nationwide facilities, only the Board is in a position to undertake systematic development of a progam to deal with foreign flag shipping.

In its internal procedures, the Board can handle many cases on the same general subject at one time, and map out a broad and definitive program for dealing with the problems presented. With all cases being screened through agency processes, the Board can give precise shadings to its rulings to fit the particular situations at hand. It can avoid the "all or nothing" result which courts often find so attractive, and it has the tools and facilities to take account of relevant economic and social data in a manner which no court can duplicate.

The problem of diversity in the administration of the law, however, does not end with the federal courts. Panlibhon shipping interests are essentially contending that the LMRA is inapplicable to all foreign flag ships. Incres openly urges this in its brief to this Court. Empresa has said much the same thing, although not so openly. In *Fruit Dispatch Co.* v. *National Maritime Union* (La. Ct. of App., No. 193, March 12, 1962, not officially reported), 50 LRRM 2077, a United Fruit subsidiary, in obtaining an injunction against picketing of Empresa vessels by NMU, persuaded the Louisiana state courts that *Benz* stood for an absolute proscription against Board jurisdiction. The argument was adopted by Judge Holtzoff in *McCulloch* v. *Sociedad*, No. 107. The Second Circuit, expressly refraining in this case from the all or nothing result, has left the issue open, while narrowly circumscribing the scope of Board jurisdiction.

If access to the peaceful processes of the Board is denied the maritime unions, they will have no alternative but to resort to self help measures to alleviate the crippling competition of Panlibhon shipping. The operators of Panlibhon vessels will doubtless seek injunctions against such activities in the state courts. They will ignore the federal courts because they have been told in *Marine Cooks* and

Afran that the *Norris-LaGuardia Act* has taken the federal courts out of the injunction business.

If authority to adjudicate the growing economic conflict between the maritime unions and Panlibhon ship operators should devolve on the state courts, the danger of diverse and conflicting decisions will be compounded many times over. The state courts of every coastal state in the nation will become potential arbiters of the profound issues involved with local laws and attitudes decisive factors in each case. Lost will be not only uniformity in administration of federal labor law, but uniformity in federal maritime law as well, *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215-17 (1917); *Pope and Talbot* v. *Hawn*, 346 U. S. 406, 409 (1953).

In *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), this Court recently stated:

> "The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the efforts of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy."

These words contain forceful implications for the issues here. For plainly, if there is to be an orderly and consistent development of a national labor policy to govern the organizing of foreign flag shipping, and the industrial peace envisioned by such policy, then the task of regulating and disciplining the organizational activities of maritime unions in the foreign flag field must be entrusted to the

Board. Only by unitary federal control will it be possible to avoid the contradictions and disparities inherent in local administration.

The claim that state courts or even federal district courts have jurisdiction of this controversy should be seen for what it is—an attempt to gain complete immunity for Panlibhon shipping from the organizing activities of American maritime unions. Panlibhon operators obviously hope for more sympathetic treatment from the courts than from the Board. They further hope that the courts will equate a finding of lack of Board jurisdiction with illegality of union conduct—otherwise court jurisdiction would not be so attractive to them.

The claim that these issues belong in the courts and not before the Board exposes a fatal inconsistency in the contentions of the Panlibhon ship owners. On the one hand they contend that the Board—a government agency—has no jurisdiction of the controversy. On the other hand, they contend that state courts—also agencies of the government—have jurisdiction of the controversy.

The very necessity for resort to the Courts of the United States—whether state or federal—emphasizes the intimate connection of the shipping operations involved with the economy of this nation. As the OEEC, *Study on the Expansion of the Flags of Convenience Fleet (1958)*, pointed out (at p. 11):

> "The extent to which shipowners, charterers, etc. have recourse to the courts of the flag state of the defendant probably reflects to a greater degree than most aspects of shipping the true relationships between the ship and her flag. Where a shipping company has no assets in the flag state, and the owners, directors and managers are not nationals, it is useless to have recourse to the courts in those

countries as they cannot enforce their decisions. It is significant that even the owners of vessels under flags of convenience prefer to have their disputes settled in the courts of the maritime countries."

Yet a further incongruity will result if Board jurisdiction is denied. On the one hand we will have this Court saying in *Marine Cooks* that protest picketing of foreign flag ships by the maritime unions is protected against injunctions by the *Norris-LaGuardia Act*, and, on the other hand, that the processes of the Board are unavailable to help resolve the disputes peacefully.

This incongruity will in turn breed inequities. For while the maritime unions will be denied access to the Board for the purpose of being certified as bargaining representatives, nothing will prevent ship operators or others on their behalf from using the facilities of the Board to file charges against the unions for secondary boycott activities or other violations of the Act, since any "person" may lodge a complaint against a union unfair practice. This is not mere speculation. In *Compania Maritima Samsoc, Ltd.*, CCH Lab. L. Rep., Par. 100081 (4th Ed. 1950), a maritime employer succeeded in persuading the Board that it did not have jurisdiction over an election petition filed by the union against his Liberian flag ship. However, when the union picketed, he procured a drydock owner to file charges against the picketing. *Moore Drydock Co.*, 92 NLRB 547 (1950). This incongruous result was pointed out by Mr. Justice Douglas in his dissent in the *Benz* case, 353 U. S. at 148.

Conclusion.

The opinion (R. 59-82) and judgment (R. 83) of the Court of Appeals for the Second Circuit, both dated January 12, 1962, reversing the order dated December 16, 1961 of the District Court for the Southern District of New York (R. 46-52), should be in all respects reversed, together with the order of the District Court dated February 15, 1962, making the mandate of the Court of Appeals the order of the District Court (R. 86-87); and the motion to dismiss the complaint (R. 45-46), by Ivan C. McLeod, as Regional Director of the Second Region of the National Labor Relations Board, dated December 13, 1961, should be granted.

Dated: October 4, 1962

Respectfully submitted,

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APPENDIX A.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 946, 29 U. S. C. §141, *et seq.*) are as follows:

SECTION 1. • • •

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act——

• • • • • •

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

• • • • • •

SEC. 9. * * *

* * * * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board——

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organi-

zation or its predecessor not issued in conformity with section 10(c).

* * * * * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * * *

SEC. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining

order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of

title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618:

ARTICLE 10:

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

* * * * * *

ARTICLE 22:

A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

* * * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 91

IVAN C. MCLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EMPRESA HONDURENA DE VAPORES, S.A.

No. 93

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, PETITIONER

v.

EMPRESA HONDURENA DE VAPORES, S.A.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 107

FRANK W. MCCULLOCH, CHAIRMAN, AND PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, AND GERALD A. BROWN, MEMBERS, NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE REGIONAL DIRECTOR AND MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinions of the district court and of the court of appeals in Nos. 91 and 93 (IR. 46–52, 59–82)[1] are

[1] The record in Nos. 91 and 93 will be designated "IR.", and the record in No. 107, "IIR."

reported at 200 F. Supp. 484 and 300 F. 2d 222, respectively. The opinion of the district court in No. 107 (II R. 51–67) is reported at 201 F. Supp. 82. The Board's Decision and Direction of Election (IR. 9–19; II R. 31–41), which is the subject of these suits, is reported at 134 NLRB No. 25.

JURISDICTION

The judgment of the court of appeals in Nos. 91 and 93 was entered on January 12, 1962 (IR. 83). The petitions for writs of certiorari were filed on April 10 and 11, 1962, respectively, and were granted on June 11, 1962 (IR. 88; 370 U.S. 915). In No. 107, the final judgment of the district court was entered on March 6, 1962 (IIR. 76–77), and an appeal therefrom was docketed in the court of appeals on April 9, 1962 (IIR. 81). The petition for a writ of certiorari was filed on May 7, 1962, and was granted on June 11, 1962 (IIR. 82; 370 U.S. 915). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 29 U.S.C. 151, *et seq.*), and of the other relevant statutes and treaties, are set forth in Appendix A, *infra*, pp. 61–67.

QUESTION PRESENTED

Whether the National Labor Relations Act extends to seagoing vessels which: (1) are beneficially owned by, and operated under the control of, an American corporation; (2) are engaged in regular sailings in foreign commerce between the United States and

Latin American ports, transporting almost exclusively the corporation's products and other supplies; but (3) fly the flag of a foreign nation, carry a foreign crew, and have certain other contacts with the foreign nation.[2]

STATEMENT

A. THE BOARD REPRESENTATION PROCEEDING GIVING RISE TO THESE SUITS

1. THE BOARD'S FINDINGS OF FACT

On November 13, 1959, the National Maritime Union of America, AFL–CIO ("NMU") filed a petition with the National Labor Relations Board pursuant to Section 9(c) of the National Labor Relations Act seeking certification as the representative of a single fleet-wide unit of all unlicensed seamen employed aboard certain Honduran flag vessels owned by Empresa Hondurena de Vapores, S.A., a Honduran corporation.[3] The petition was filed against United Fruit Company ("UFCO"), an American corporation, of which Empresa is a wholly owned and controlled subsidiary. Sociedad Nacional de Marineros de Honduras ("Sociedad"), a Honduran union which currently represented the employees aboard the ves-

[2] The issue of the Act's applicability to foreign flag vessels having substantial contacts with the United States is also presented in *Incres Steamship, Ltd.*, v. *International Maritime Workers Union, No. 33*, this Term. For the reasons set forth *infra*, p. 35, n. 38, the Board is of the view that the judgment of the Court of Appeals of New York in that case should be affirmed.

[3] The facts set forth herein are derived primarily from the Board's Decision and Direction of Election, which was attached as an exhibit to the complaints in the district court (IR. 9–19; IIR. 31–41).

sels, was invited to intervene in the proceedings but declined to do so or otherwise to participate. However, Sindicato Maritimo Nacional de Honduras ("Sindicato"), another Honduran union, did intervene and participate, as did Empresa. UFCO, together with Empresa, contested the Board's jurisdiction on the ground that the Act does not apply to ships flying the flag of a foreign nation (IR. 9–10, 17; IIR. 31–32, 39). The underlying facts of the maritime operations involved, as found by the Board, are as follows:

UFCO is a New Jersey corporation with its principal place of business in Boston, Massachusetts. Of its approximately 8.7 million outstanding shares of stock, over 8.5 million are owned by United States citizens. UFCO is primarily concerned with the raising of bananas, sugar, cacao and other tropical produce and with their transportation to market and sale. Most of its trade is between Central and South American locations and United States ports. The value of its imports into the United States exceeds one million dollars annually. The imports are carried on ships either owned or chartered by UFCO (IR. 12; IIR. 34).

UFCO conducts its operations through fifty to sixty subsidiaries, many of which are foreign corporations. Day-to-day operations are handled by the subsidiaries themselves, while overall control of policy and development resides with UFCO. Thus, long range plans concerning expansion, contraction, or other changes in the operation of subsidiaries are generally controlled by UFCO, and its decision on such matters

is based upon the needs and planned development of UFCO's overall business in the production, transportation and sale of tropical produce, rather than upon the needs or advancement of the subsidiaries as independent corporations (IR. 12–14; IIR. 35).

Empresa is one of UFCO's wholly-owned subsidiaries. If was organized under Honduran law in 1941 by UFCO, which supplied the capital. Empresa's officers are elected by its directors who are in turn elected by UFCO, the sole stockholder. Empresa is engaged in the business of owning and operating vessels registered under Honduran law. Empresa does not carry passengers or cargo on its own account, but has, since its incorporation, time chartered[4] all of its vessels, and its income from maritime operations (exceeding $400,000 annually) is derived wholly from the charter fees. With a few possible exceptions, Empresa's business is limited to chartering its vessels to UFCO, and the 17 ships which were the subject of the NMU representation petition were so chartered (IR. 13–14; IIR. 35–36).[5]

Under the time charters, Empresa provides ships that are fully equipped and ready to be put to sea.

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[4] Under a "time" charter, the charterer provides not only the vessel, but also the officers and crew. This is to be distinguished from a "bareboat" charter, which covers only the vessel.

[5] Empresa owned 14 of the vessels, while 3 were owned by Balboa Shipping Corporation, a Panamanian corporation wholly-owned by UFCO. Empresa was the managing agent for those vessels which, like its own ships, fly the flag of Honduras. The three Balboa vessels were, for all practical purposes, as fully under Empresa's control as were its own vessels. (IR. 14; IIR. 36.)

It is responsible for the physical condition of the ships and for provisioning them, except for fuel. Thus, Empresa takes care of day-to-day upkeep and drydocking and repairs, both of the latter usually being done in the United States.* Supplies are purchased both in foreign nations and the United States, purchases in the United States being made from Maratrop Trading Corporation, a wholly-owned UFCO subsidiary (IR. 14; IIR. 36). Empresa is also responsible for hiring the officers and crews, and handling all matters concerning terms and conditions of employment including payment of wages and discipline of personnel. The crews, hired in Honduras, are primarily Honduran citizens and they sign Honduran shipping articles (IR. 14, 4; IIR. 36–37, 2). Empresa had recognized, and entered into a contract with a Honduran union, Sociedad, as the representative of its seamen (IR. 17, 22–35; IIR. 40, 9–23).

As the charterer of the vessels, UFCO determines what voyages they will make, their ports of call, their length of stay in various ports, and what cargoes they will carry. In exercising its control, UFCO deals directly with the particular vessel's captain. However, if UFCO has complaints concerning the handling of the vessel or its mechanical or other condition, it takes them up directly with Empresa (IR. 14–15; IIR. 37).

The ships are used primarily to carry produce of UFCO's Latin American operations, and on any given

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*However, improvements for vessels or the purchase and scrapping of vessels are matters within the overall policy control of UFCO (IR. 14; IIR. 36).

trip might call at ports in various Central and South American countries including Honduras. Since the bulk of the trade is between such countries and the United States, the vessels regularly call at United States ports. On return trips to Latin America, the ships carry cargo for various UFCO subsidiaries, as well as general cargo for shippers and consignees outside the UFCO organization. Empresa vessels are wholly integrated in UFCO shipping operations. Thus, UFCO owns outright a number of cargo ships registered under United States law, and also charters boats from one of its United States subsidiaries. These ships, like Empresa's, are under the jurisdiction of UFCO's Marine Division, and the two groups of vessels are used interchangeably, carrying the same types of cargoes and calling at the same ports, both domestic and foreign. In assigning a vessel to a particular run, the determination depends on the vessel's availability, size and speed, not on its ownership or flag (IR. 15; IIR. 37).

2. THE BOARD'S CONCLUSIONS AND DIRECTION OF ELECTION

On these facts, the Board concluded that Empresa's maritime operations were part of a single, integrated maritime operation under the continuous direct control, and either direct or ultimate ownership, of UFCO, and hence were an essential part of a seagoing enterprise located in and directed from the United States and engaged in United States commerce within the meaning of Section 2(6) of the Act. The Board further concluded that Empresa, by its immediate authority and control over hiring and other terms and

conditions of employment, and UFCO, by its control of Empresa and of the vessels and their operations, were joint employers of the employees covered by the petition. Accordingly, the Board, applying the principle enunciated in *West India Fruit and Steamship Co.*, 130 NLRB 343,[1] held that the maritime operations involved possessed those substantial United States contacts which brought them within the Act's coverage despite the foreign registry of the vessels, Empresa's foreign incorporation, and the other foreign aspects involved (IR. 15–17; IIR. 38–39). The Board therefore concluded that "Empresa and UFCO and their maritime operations subject of the petition are in, and affect, commerce within the meaning of Sections 2 (6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding" (IR. 17; IIR. 39).

The Board ordered that an election be conducted among the employees of the UFCO-Empresa vessels to determine whether they wished to be represented by the NMU, by Sindicato, or by no union (IR. 18; IIR. 40–41).

B. THE COURT PROCEEDINGS

Two suits were then brought, in two different district courts, to enjoin the Board's Direction of Election. On December 12, 1961, Empresa brought suit against the Board's Regional Director in the District

[1] In *West India* (discussed *infra*), the Board held that the Act may be applied to foreign flag vessels where they have substantial points of contact with the United States, and these outweigh their foreign points of contact.

Court for the Southern District of New York,[8] and, on December 16, 1961, Sociedad, the Honduran union, currently representing the seamen, brought suit against the members of the Board in the District Court for the District of Columbia. The complaints alleged that the Board's Direction of Election exceeded its powers under the Act and violated the Constitution, principles of international law, and a treaty between the United States and Honduras (IR. 6; IIR. 4–6). The Regional Director and the Board filed motions to dismiss the complaints on the grounds that the district court lacked jurisdiction over the subject matter, that the request for relief was premature, and that, in any event, the Board's action was proper (IR. 45–46; IIR. 48).[9]

1. THE DECISIONS OF THE NEW YORK COURTS

On December 16, 1961, the district court (Judge Palmieri), after hearing, denied Empresa's motion for a temporary injunction. The court held that, although the allegation that the treaty with Honduras had been violated raised a sufficiently substantial constitutional question to give it jurisdiction to review the Board's Direction of Election under *Fay* v. *Douds*,

[8] The Board, in its Decision, provided that the election should be conducted under the supervision of the Regional Director for the New York Region. He had ordered the election to commence on December 17, 1961. On those vessels arriving in ports of the United States between that date and January 31, 1962, the election was to be conducted in port. On vessels not scheduled to arrive during that period, the election was to be conducted by mail (IR. 18, 2; IIR. 40, 3–4).

[9] In the New York suit, it was also asserted that the members of the Board were indispensable parties defendant (IR. 46).

172 F. 2d 720 (C.A. 2),[10] the mere holding of the election, pending a final determination of the legal issue, would not result in irreparable damage to Empresa (IR. 46–52).

Empresa appealed from this ruling, and, on January 12, 1962, the Second Circuit reversed the district court and held that a temporary injunction should issue (IR. 59–82). The court of appeals (in an opinion by Judge Friendly) first discussed the question of district court jurisdiction. It recognized that, heretofore, the district court had been held to have jurisdiction to review Board representation determinations only where a constitutional question "not transparently frivolous" was presented or where the Board had "acted in plain contravention of a specific mandate of the Act." The court conceded that the instant case did not fall within either of these exceptions; for, "although we conclude that the Board erred, its error was far from 'plain,'" and, since Congress may legislate contrary to the terms of a treaty, the claim that the Board, by impairing the treaty with Honduras, "violated any constitutional rights of plaintiff" was "transparently frivolous." However, the court added that these two categories were not exhaustive of district court jurisdiction; that there was also such jurisdiction "when, as here,

[10] In that case, the Second Circuit held that, although the district court generally was without jurisdiction to review Board action in a representation proceeding at the suit of an aggrieved union, an exception existed where a substantial constitutional question was presented. See also, *Leedom v. Kyne*, 358 U.S. 184, extending that principle to a situation where the Board action violates a plain statutory requirement.

there is a substantial claim that the Board is exceeding its jurisdiction in the field of foreign relations and is thereby offending a friendly foreign government * * *" (IR. 67–68). Nor, in the court's view, was a different conclusion required by the fact that the suit was brought by an employer, Empresa, who, unlike a labor organization, had a reliable means of obtaining review of the Board's representation decision in the court of appeals, pursuant to Sections 9(d) and 10 (e) or (f) of the Act, when, and if, it became the basis for an order requiring Empresa to bargain with a Board certified representative. The court concluded that a distinction should be drawn "between a case with international aspects and one without. If action ordered by the Board would trench on the jurisdiction of a foreign government contrary to the will of Congress, the best time to stop it is before the offense occurs, not somewhere along the line" (IR. 69–70).[11]

The court of appeals then turned to the "merits" and the question of Board power over the vessels involved.[12] The court conceded that Sections 2(6), 2(7)

[11] The court also sought to distinguish the situation here on the ground that, without Sociedad on the ballot, it was not likely that "a victory by a particular union at the polls might eliminate any need for resorting to the courts; here, whether the winner was NMU, Sindimar, or 'no-union,' plaintiff would suffer by being obliged to breach its contract with [Sociedad] and, on the allegations of its complaint, to violate Honduran law by doing so" (IR. 69–70).

[12] While we respectfully disagree with the holding of the court of appeals that the district court had jurisdiction, at the suit of the employer, to enjoin the Board from conducting the election herein, we do not believe that this Court will have to

and 9(c) of the Act (*infra*, pp. 63–64) literally cover this case, but added that the words should not be "stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage." The court proceeded to interpret the reach of the Act in accordance with the principles enunciated in *Lauritzen* v. *Larsen*, 345 U.S. 571, which it articulated as follows: the law of the flag is not decisive, but of "cardinal importance," in determining applicable law; "[h]ow 'cardinal' the importance is and how much 'weight' should be given must depend, in the absence of clear expression by Congress, on what other factors of foreign and United States interest are present, and on the nature of the United States statute sought to be applied * * *" (IR. 72–73). Applying this test, the court concluded that the National Labor Relations Act did not apply to the vessels involved in this case. In its view (IR. 77):

> The case made by plaintiff's complaint goes far beyond the flying of the Honduran flag, important as *Lauritzen* teaches that to be. In this case there are also the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels'

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reach that question. The District of Columbia suit was brought by a union which does not have the same statutory remedy available to Empresa. *Leedom* v. *Kyne*, 358 U.S. 184, holds that a union can maintain an action in the district court challenging a Board representation proceeding, if it establishes that the Board has clearly exceeded its statutory power. Thus, this Court would, in any event, have to decide the question of Board power in the District of Columbia suit, and its decision there will settle the basic controversy for this case as well.

regular visits to Honduras, the Honduran corporate identity—admittedly not fictitious—of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters. Though the vessels are engaged in the foreign commerce of the United States, they are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed for the purpose here at issue, by Honduras' interests.[13]

2. THE DISTRICT OF COLUMBIA SUIT

Meanwhile, on January 18, 1962, the District Court for the District of Columbia (Judge Holtzoff) granted a preliminary injunction and denied the Board's motion to dismiss the complaint, in the suit brought against the members of the Board by Sociedad (IIR. 51–67, 68–69). The court held that, "the Labor Management Relations Act of 1947, should be construed as not conferring any authority or power on the National Labor Relations Board to conduct elections for collective bargaining purposes among foreign seamen manning vessels flying a foreign flag, and employed under contracts executed in a foreign country pursuant to foreign law" (IIR. 67). Thereafter, cross-motions

[13] The court carefully noted (IR. 82) that, "[i]n order to avoid any possible misunderstanding in this controversial area, we emphasize that we are deciding only the case before us; what the result should be when the contacts of the country of the flag are weaker relative to those of the United States than here, we do not say."

for summary judgment were filed, and the district court granted judgment for Sociedad and made the injunction permanent (IIR. 76–77). The Board appealed this judgment to the court of appeals, and, after the appeal was docketed therein but before hearing or judgment, petitioned this Court for certiorari, which petition was granted (IIR. 78–82).[14]

SUMMARY OF ARGUMENT

I

A. The jurisdictional coverage of the National Labor Relations Act is defined—not in terms of the status of the individual involved or the source of the particular activity—but rather in terms of whether the activity would tend to have an effect upon the foreign or domestic commerce of the United States. A labor dispute on a foreign flag vessel, which, like the vessels here, is regularly engaged in trade or traffic between the United States and other countries, could disrupt the flow of commerce to and from this nation no less than one on an American flag ship. Thus, the Act would literally encompass unfair labor practices and representation questions involving such foreign flag vessels. Nor is the Act rendered inapplicable merely because the vessels fly a foreign flag and are registered in a foreign country; it was settled long ago that Congress has power to regulate conduct occurring thereon, if it so desires. See *Wildenhus'* case, 120 U.S. 1.

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[14] The NMU, which intervened in this suit, also filed a petition for certiorari, which is still pending, No. 141, this Term.

B. However, even where the scope of a domestic statute is such that it can be applied to vessels flying the flag of another nation, general principles of maritime law and international comity require that an accommodation be made so as to minimize the possibility of collision between two sovereignties, each applying its own laws to the transaction. In *Lauritzen v. Larsen*, 345 U.S. 571, a Jones Act case, this Court set forth guide lines for making this accommodation. It held that the conflict between competing laws was to be resolved by "valuing points of contact between the transaction and the states or governments whose competing laws are involved"; that, although the flag was of "cardinal importance" in determining applicable law, it could be outweighed by other factors (*Id.*, at 582, 584–588).

The Board has utilized similar guide lines in applying the National Labor Relations Act to foreign flag vessels. Accepting the premise that a vessel bears the nationality of the flag it flies, the Board has gone on to ascertain whether the foreign vessel has substantial contacts with the United States. If it finds that it does, and the foreign contacts are relatively insubstantial, the Board has concluded that the operations of the vessel affect commerce within the meaning of the Act notwithstanding its foreign nationality; if it finds otherwise, the Board has concluded that the Act is inapplicable. An examination of the Board cases shows that, in general, the Board has held the Act applicable to foreign flag ships where, after evaluation of all aspects of the operation,

it has concluded that the shipping involved is essentially that of this nation rather than a foreign nation.

C. *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, is not inconsistent with the conclusion that the Act applies to foreign flag vessels having substantial contacts with the United States. *Benz* merely holds that the Act is inapplicable to a vessel whose only contact with the United States was that it happened to be *temporarily* in an American port.

Application of the Act to foreign flag vessels would not negate the so-called "internal order" doctrine. That doctrine is merely part of the general rule that cardinal weight should be accorded the laws of the flag state; since the flag law doctrine does not preclude the weighing of points of contact, neither would the internal order doctrine. In any event, application of the Act to seaborne commerce would involve no interference with the subjects traditionally encompassed by the internal order doctrine.

Finally, it is immaterial that there is no specific indication in either the terms or the legislative history of the Act that Congress intended to reach foreign flag vessels. The Act contains no express inclusions; hence, there would have been no occasion for Congress to single out such vessels.

II

A. Board assertion of jurisdiction over the vessels here would not contravene the Treaty of Friendship between the United States and Honduras. Article XXII of the Treaty, which gives the consular officer exclusive jurisdiction over controversies involving the internal order of the vessel, merely incorporates

the "internal order" doctrine; as shown, Board determination of a bargaining representative does not impinge on the area normally encompassed by that doctrine. Article X provides that the Honduran flag shall be proof of the Honduran nationality of the vessel; the Board does not deny the vessel's foreign nationality but only decides that, in view of the vessel's substantial contacts with the United States, it should nonetheless be subjected to the labor laws of this nation.

B. There is no substantial basis for the Department of Defense's assumption that defense policies would be subverted by Board assertion of jurisdiction over vessels flying the flags of Panama, Liberia or Honduras (the Panlibhon fleet). Moreover, the highly speculative consequences to our effective control over Panlibhon shipping are more than outweighed by the detrimental effects of not applying the Act on the important objectives of achieving a peaceful resolution of labor disputes and the development of a uniform national labor policy.

C. Nor is there any substantial basis for the fear, voiced by the Department of State, that application of the Act to foreign flag ships having substantial contacts with the United States would unsettle international relations.

III

The Board properly concluded that the vessels here had sufficient points of contact with the United States to bring them under the Act. The contrary conclusion of the court of appeals in Nos. 91 and 93 stems from its rejection of the Board's finding that United Fruit was a joint employer of the seamen on the

Empresa vessels. In view of the evidence showing that Empresa was part of an integrated operation owned and controlled by United Fruit, the court's action was erroneous. Accepting the Board's findings, it is clear that Empresa's shipping operation was not that of a truly foreign venture serving the shipping needs of a foreign country, but rather only an incident of the operations of an American corporation, United Fruit, which utilized the Empresa vessels to engage in the foreign commerce of this nation.

ARGUMENT

INTRODUCTION

During the past ten years, the shipping needs of the United States have been met more and more by use of vessels—like those here—which are registered in and fly the flags of certain small foreign nations (principally Panama, Liberia and Honduras), and have a crew comprised of foreign nationals.[15] These vessels are referred to as "flag of convenience" or

[15] As of July 1959, a total of 518 vessels, aggregating over 10 million deadweight tons, owned and/or controlled by American interests, were registered under the flags of Panama, Liberia or Honduras (referred to as the Panlibhon countries), while the United States-flag merchant fleet totaled 2,847 private and government-owned vessels of 33½ million deadweight tons. Of the vessels under United States flag, only 206 were of post-World War II construction, the remainder being inactive or largely obsolete. See *The Role of the U.S. Merchant Marine in National Security*, National Academy of Sciences-National Research Council, Publication 748 (1959), hereafter called *Project Walrus Report*, p. 10; *Panlibhon Registration of American-Owned Merchant Ships*, 60 Col. L. Rev. 711, 715 (1960). As of January 1961, the total American-owned and/or controlled ships under Panlibhon registry was 456, aggregating over 11 million deadweight tons. See Dye, *Flags of Convenience; Mari-*

"flag of necessity" ships. Many of the ships are owned and/or controlled by American interests (n. 15, *supra*), and were either transferred from American registry or were constructed in foreign shipyards and placed under foreign registry to begin with.[16] The American-controlled vessels are employed primarily to carry products and materials which are utilized in the business operations of the American beneficial owner,[17] and they either never visit the flag country or, as here, do so only in connection with the business of the American beneficial owner,

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time Dilemma, United States Naval Institute Proceedings (February 1962), 76, 83.

In addition to the American-owned and/or controlled ships, there were under Panlibhon registry, on December 31, 1960, another 1,397 ships of over 23 million deadweight tons. *An Analysis of the Participation of U.S. and Foreign-Flag Ships in the Oceanborne Foreign Trade of the United States*, U.S. Department of Commerce, Maritime Administration (1962), 4.

[16] Current procedures of the Maritime Administration of the U.S. Department of Commerce permit the transfer of vessels from American to foreign registry, provided that ultimate American ownership and control are maintained and it is agreed that the ships would be made available to the United States in the event of national emergency. New ships are not subject to these restrictions; a prospective American shipowner is free at any time to build a ship in a foreign shipyard, and he need not seek permission from the Maritime Administration before registering it in a foreign country. However, many of these new ships are considered under effective United States control, for their beneficial owners have voluntarily agreed to submit them to such control in time of emergency. See *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet*, 69 Yale L.J. 498, 500–502 (1960); *Panlibhon Registration of American-Owned Merchant Ships*, 60 Col. L. Rev. 711, 718–721 (1960).

[17] The Project Walrus Report points out that (p. 9): "'Flag of convenience' ships account for 70 percent of U.S. total ton-

The increasing use of these foreign flag vessels by American interests is attributable to the following: (1) tax savings (profits accruing from the shipping operations are not taxed in the United States until such time as they may be distributed to American shareholders); (2) labor cost savings (the wages of foreign seamen are substantially lower than those of American seamen); and (3) various incidental savings (e.g., lower insurance rates, lower costs for ship repairs, avoidance of U.S. maintenance standards). As a result of these foreign registrations, employment on American-flag vessels has dropped sharply—from 158,860 positions in 1945, to 84,300 in 1951, to 57,507 in 1955, and to 49,281 in 1960.[10]

In an effort to protect their labor standards against the threat imposed by this foreign competition, the American maritime unions have sought to organize the seamen on the "flag of convenience" vessels. They have been met with resistance by the shipowners

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nage in dry bulk cargo carriers and about one-half of U.S. total tonnage in tankers." Most of the tanker tonnage (about 7 million deadweight tons) consisted of ships owned by American interests (*Id.*, 55). Similarly, the Maritime Administration has noted that, in 1960, Panlibhon ships accounted for 39 percent of the total oceanborne foreign trade of the U.S. and ships under "effective U.S. control" accounted for 23.3 percent of the total. *Oceanborne Foreign Trade, op. cit.*, 4. The *Maritime Transport Report* (May 2, 1961), issued by the Organization for European Economic Co-Operation, states (p. 53) that the Liberian fleet, which 10 years ago accounted for less than 1 percent of the world's tankers, ranked in mid-1960 as the world's largest tanker fleet and second largest in terms of tanker tonnage new or less than 5 years old.

[10] See *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet*, 69 Yale L.J. 498, 499–500, 502–503 (1960).

who have refused to recognize them as the representatives of their seamen, and, in some cases, have engaged in unfair labor practice conduct to discourage unionization. The unions have responded by filing representation petitions and unfair labor practice charges with the Board, and by resorting to picketing and other economic weapons.

The question presented is whether the Board may properly apply the National Labor Relations Act to representation questions and unfair labor practice questions involving these foreign flag vessels. It is the position of the respondents in Nos. 91, 93, and 107, and the district court in No. 107, that the Act has no application whatever to foreign flag vessels of the type here. It is the position of the Board, on the other hand, that the applicability of the Act to a foreign flag vessel depends on weighing the vessel's points of contact with the United States against those with the flag country, and, if the former preponderate, the vessel comes within the ambit of the Act. This principle was accepted by the court of appeals in Nos. 91 and 93, but the court concluded, contrary to the Board, that the points of contact with the flag country of the vessels involved were sufficient to outweigh those of the United States.

We show below that: (1) the Act may properly be applied to foreign flag ships which have substantial points of contact with the United States, and these outweigh the foreign contacts; (2) application of the Act to such vessels would not impair treaty obligations, nor adversely affect national defense or international relations; and (3) the Board properly concluded that the vessels here were subject to the Act.

I. THE NATIONAL LABOR RELATIONS ACT MAY PROPERLY BE CONSTRUED AS APPLYING TO VESSELS FLYING THE FLAGS OF OTHER NATIONS, WHERE THEY HAVE SUBSTANTIAL POINTS OF CONTACT WITH THE UNITED STATES AND THESE OUTWEIGH THE FOREIGN CONTACTS

A. The literal terms of the Act cover labor disputes involving foreign flag vessels which are engaged in commerce between the United States and foreign nations

Section 10(a) of the National Labor Relations Act empowers the Board to prevent unfair labor practices "affecting commerce," and Section 9(c) confers power to resolve representation questions "affecting commerce." Section 2(6), in relevant part, defines "commerce" as "trade, traffic, commerce, transportation, or communication * * * between any foreign country and any State, Territory, or the District of Columbia." Section 2(7) defines "affecting commerce" as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Moreover, Section 1 of the Act declares the policy of eliminating practices "which have the intent or the necessary effect of burdening or obstructing commerce," and of establishing a system of law which "safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce." And, this Court has pointed out that: "The Act on its face * * * evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce. * * *" *National Labor Re-*

lations Board v. *Fainblatt*, 306 U.S. 601, 607.[19] It "is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion [for determining the jurisdictional coverage of the Act]." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 222.

In view of the breadth of the terms defining the jurisdictional reach of the Act,[20] and of the other indications that coverage turns, not on the source of particular activity, but rather upon the effects which it would have upon the foreign and domestic commerce of the United States, it cannot be assumed that Congress intended the Act to operate only within the territorial limits of the United States.[21] Accordingly, the Act has consistently been held applicable to American flag ships, even while they were operating outside the territorial limits of the United States. See *National Labor Relations Board* v. *Waterman*

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[19] See also, *Polish National Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 647; *Guss* v. *Utah Board*, 353 U.S. 1, 3–4.

[20] The terms "employer," "employee" and "labor dispute"—defined in Sections 2(2), 2(3) and 2(9)—have similar breadth. Thus, the Act has been held applicable to non-resident alien employees, while employed in the United States. See *Brown Company*, 109 NLRB 173; *Italia Societa*, 118 NLRB 1113, 1117.

[21] There is a general canon that legislation should be construed to operate only within the territorial limits of the United States. See *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285; *Blackmer* v. *United States*, 284 U.S. 421, 437. Congress, however, has power to regulate activity occurring beyond those limits where such activity would have an impact on the economy of the United States. An intention to exercise that power is manifested where, as here, an "effects" test of jurisdiction is used. See *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377; *Steele* v. *Bulova Watch Co.*, 344 U.S. 280; *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 704–705.

Steamship Co., 309 U.S. 206; *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U.S. 31; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U.S. 656. Cf. *Grace Line Inc.*, 135 NLRB No. 70. The same considerations would lead to the conclusion that the Act also encompasses unfair labor practices and representation questions involving foreign flag vessels which, like the vessels here, are regularly engaged in trade or traffic between the United States and other countries. As the court of appeals recognized (IR. 80–81), American unions have a vital interest in labor conditions on such vessels (see also, pp. 18–21, *supra*), and a labor dispute between the unions and the vessels could disrupt the flow of commerce to and from this nation no less than one on an American flag ship.

Nor is the Act rendered inapplicable merely because the vessels fly a foreign flag and are registered in a foreign country. Although vessels are deemed to be part of the country whose flag they fly, the courts below properly noted (IR. 73; IIR. 56–60) that Congress nevertheless possesses power to regulate conduct occurring thereon. In the words of the court of appeals (IR. 73): "The Board is right in saying the scope of its power in respect of [foreign flag ships] is not to be determined by the simple notion that a Honduran registered ship is a floating piece of Honduran territory; that is a mere 'figure of speech' whose fictitious character was exposed long ago, *Wildenhus's Case*, 120 U.S. 1 (1887); *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 123–124 (1923)."

B. However, in accordance with general principles of maritime and international law, the Board has balanced the foreign vessel's points of contact with the various nations involved, and has applied the Act only where the American contacts preponderate

However, even where the scope of a domestic statute is such that it can be applied to vessels flying the flag of another nation, general principles of maritime law and international comity require that an accommodation be made so as to minimize the possibility of collision between two sovereignties, each applying its own laws to the transaction. In *Lauritzen* v. *Larsen*, 345 U.S. 571, this Court set forth guide lines to aid the courts in determining the extent to which domestic statutes with general jurisdictional provisions may properly be applied to shipping operations having foreign aspects. In holding that the Jones Act (46 U.S.C. 688)—which gives a right of action for damages in the federal courts to "any seaman who shall suffer personal injury in the course of his employment"—was not applicable to a suit brought by a Danish seaman who was hired in the United States and who suffered an injury aboard a Danish flag ship while it was in Cuban waters, the Court pointed out that (345 U.S. at 582):

> Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority. * * *

The Court then enumerated seven factors which could conceivably influence the choice of law to govern a maritime tort claim,[22] and evaluated the weight and significance to be accorded to each. It concluded that the flag was of "cardinal importance" and "overbears most other connecting events in determining applicable law" (*Id.* at 584–585). The Court added, though, that the allegiance or domicile of the injured seamen or the allegiance of the shipowner were also entitled to weight, and might in an appropriate case override the flag and warrant application of the laws of the seaman's or the shipowner's state (*Id.* at 586–588).[23] But, finding that these factors were not present in *Lauritzen*, the Court held that the contacts with the United States were insufficient to override the law of Denmark, the flag country, which allowed the injured seaman a lesser measure of recovery than the Jones Act.[24] See also *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382–384.[24a]

[22] These were: (1) place of the wrongful act; (2) law of the flag; (3) allegiance or domicile of the injured; (4) allegiance of the defendant shipowner; (5) place of contract; (6) inaccessibility of foreign forum; and (7) the law of the forum.

[23] In establishing that the allegiance of the shipowner was an important factor, the Court noted that (*Id.* at 587): "* * * it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them. * * *"

[24] See, however, *Bartholomew* v. *Universe Tankships*, 263 F. 2d 437 (C.A. 2), certiorari denied, 359 U.S. 1000; *Southern Cross Steamship Co.* v. *Firpis*, 285 F. 2d 651 (C.A. 1), certiorari denied, 365 U.S. 869; *Zidanski* v. *Empresa Hondureña de Vapores*, 113 F. Supp. 93 (S.D.N.Y.).

[24a] A similar approach is used by the Court in determining which of two conflicting state laws shall govern, where both states

The Board has utilized similar guide lines in applying the National Labor Relations Act to foreign flag vessels. Accepting the premise that a vessel bears the nationality of the flag it flies, the Board has gone on to ascertain whether the foreign vessel has substantial contacts with the United States. If it finds that it does, and that the foreign contacts are relatively insubstantial, the Board has concluded that the operations of the vessel affect commerce within the meaning of the Act notwithstanding its foreign nationality; if it finds otherwise, the Board has concluded that the Act is inapplicable. An examination of the cases thus far decided by the Board illustrates how the Board has applied these principles:

1. *West India Fruit and Steamship Co.*, 130 NLRB 343, and *Owens-Illinois Glass Company*, 136 NLRB No. 32.[25]—The vessels in these cases were owned directly by an American corporation and made regular trips between the United States and the Caribbean, carrying cargo;[26] they were provisioned and fueled in the United States, and drydocked and re-

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have an interest in the transaction. See *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66; *Alaska Packers Ass'n v. Industrial Comm'n*, 294 U.S. 532.

[25] This decision is set forth in Appendix B, *infra*, pp. 68–74.

[26] In *West India*, the vessel carried boxcars loaded with American products from Belle Chase, Louisiana to Havana, Cuba; in Havana, the cars were placed ashore and sent to their ultimate consignees who unloaded them; they were then reloaded, mostly with sugar, placed back aboard the vessel, and returned to Belle Chase, from where they were sent to the American consignees. In *Owens Illinois*, the vessels carried pulpwood from the Bahamas to Jacksonville, Florida, for use in *Owens'* American operations.

paired there. However, the vessels were registered in, and flew the flag of, Liberia,[27] and the crew members were foreign nationals who did not reside in the United States, and they signed shipping articles of the flag country. But, the vessels never visited the flag country, did not carry any of its trade, and the crew members were not necessarily citizens of the flag country. In these circumstances, the Board concluded that the vessels possessed sufficient contacts with the United States to bring them within the reach of the Act.[28]

2. *Peninsular & Occidental Steamship Co.*, 132 NLRB 10,[29] and *Eastern Shipping Corp.*, 132 NLRB 930.—The vessels in these cases were primarily passenger cruise ships, which made regular trips between Miami, Florida and various ports in the Caribbean, taking aboard most of their passengers in Miami and returning them there at the end of the

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[27] Except for one of the boats in *Owens-Illinois*, which was registered in, and flew the flag of, Honduras.

[28] *West India* was an unfair labor practice case, the charges having been filed by an American union which was seeking to organize the seamen employed on the vessel; the Board found that the employer had engaged in conduct violative of Section 8(a) (1) and (3) of the Act; its order is pending before the Court of Appeals for the Fifth Circuit, on the Company's petition to review, No. 18929. *Owens-Illinois* was a representation case, initiated by an American union seeking to represent the seamen involved; the Board directed an election, which was enjoined by the District Court for the District of Columbia; the case is now on appeal before the Court of Appeals for the District of Columbia Circuit. *Owens-Illinois Glass Co.* v. *McCulloch*, 50 LRRM 2041 (D.D.C.), April 13, 1962, appeal pending (C.A.D.C.), No. 17040.

[29] For an earlier phase of this case, see 120 NLRB 1097.

voyage. The vessels flew a foreign flag and their crew members were non-resident foreign nationals.[30] But, as in *West India* and *Owens-Illinois*, the vessels never visited the flag country, and did not carry any of its trade; they were provisioned, fueled and drydocked and repaired in the United States. However, unlike in the other two cases, they were not owned directly by an American, but by a foreign corporation. The Board found this difference not to be material, because the foreign corporation was either a mere instrumentality of an American corporation, or shared control over the shipping venture with an American corporation.[31] Accordingly, the Board concluded that the ves-

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[30] In *Peninsular & Occidental*, the flag and registry was Liberian, while in *Eastern* it was Panamanian. The crew signed American shipping articles in the former case, and Panamanian articles in the latter.

[31] Thus, in *Peninsular & Occidental*, the ship was owned by Blue, a Liberian corporation, which chartered it to Green, another Liberian corporation, and Green in turn subchartered it to Peninsular. The Board found that Blue and Green were wholly owned by, and were mere instrumentalities of, Peninsular, which in fact had full control of the vessel and was its beneficial owner. In *Eastern*, the ship was owned by McCormick, a Panamanian corporation, 95 per cent of whose stock was owned by neither citizens nor residents of the United States. McCormick entered into a contract with Eastern—an American owned corporation—whereby the latter agreed to serve as exclusive agent for McCormick, with responsibility for the sale of passenger tickets and sales promotion; purchasing materials and supplies for the ship; handling repairs; providing sufficient dockage and warehouse space; and clearing the ship and its passengers through immigration, customs and other port authorities. The Board found that McCormick and Eastern were a single integrated enterprise, in which the various activities essential to the success of the shipping venture were divided between the two companies.

sels involved possessed sufficient points of contact with the United States to render the Act applicable.[32] As the Board stated in *Eastern* (132 NLRB at 938), the "contacts with the United States are not simply the concomitance of the international seaborne traffic of a truly foreign commercial venture. On the contrary, the facts show that the * * * enterprise * * * is essentially a domestic, United States operation, the primary purpose of which is to participate in the commerce of this Nation."

3. *Hamilton Bros.*, 133 NLRB No. 85.—The vessels in this case, a representation proceeding, were owned by an American corporation, and they were engaged in regular trips between Tampa, Florida and various Central American countries. They carried bananas and coconuts for the corporation's account from the latter and export cargo on the return trip. One vessel was of Honduran registry and the other of Nicaraguan or Honduran registry; the crews were principally Nicaraguan, Costa Rican and Honduran, and they were hired both at Tampa and in foreign ports. The home port of the vessels was Tampa, where they were repaired and serviced. The difference between this case and prior cases, however, was

[32] In *Peninsular & Occidental*, which was an unfair labor practice case, the Board proceeded to find that the Company had, *inter alia*, refused to bargain with an American union, which had been certified by the Board, in violation of Section 8(a)(5) of the Act; the Board's order is pending before the Court of Appeals for the Fifth Circuit on the Board's petition for enforcement, No. 19451. In *Eastern*, which was a representation case, the Board directed an election on the petition of an American union, which election the union subsequently lost.

that the vessels did trade with the nations of their registry (Honduras and Nicaragua), and the union seeking representation rights with respect to the seamen involved was a Honduran union. The Board nonetheless found that the points of contact with the United States were sufficient to outweigh the foreign points of contacts, and held the Act applicable to the vessels.[33] Respecting the trade with the flag countries, the Board stated (133 NLRB No. 85, p. 3): "Clearly, such foreign trade contacts of the vessels as may exist with any particular foreign nations, whether their flag state or not, are merely a concomitance of the Employer's shipping operations in the area of American international trade. Consequently, they do not create, either alone or in conjunction with the other attendant foreign contacts, such substantial connections with important interests of any foreign nation as to require a finding that the operations are essentially the shipping of a foreign nation and, thus, outside the coverage of the Labor Act." And, respecting the petitioning union's organization under the laws of Honduras, the Board added, "such incorporation does not alter the fact that American shipping is involved in this proceeding, nor does it convert what is here a domestic dispute concerning the representation of employees in American foreign commerce into a foreign labor matter outside the Act" (*ibid.*).

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[33] The Board directed a representation election in a single unit covering both ships. Subsequently, the Honduran union, which had sought a separate election for each ship, withdrew its petition.

As we show *infra*, pp. 54–55, essentially the same factors are present in the *United Fruit Company* representation case, 134 NLRB No. 25 (IR. 9–9; IIR 31–41), which is the subject of this litigation.

4. *Dalzell Towing Company*, 137 NLRB No. 48.[34]—This was a representation proceeding initiated by an American union, seeking to represent the seamen on the Panamanian flag ship, *Estrellita*. The ship was owned by a Panamanian corporation, Suffolk, a wholly owned subsidiary of Oil Transfer, an American corporation, and the two companies had interlocking directors and officers. From offices in New York which it shared with Oil Transfer, Suffolk chartered the *Estrellita*, a tanker, on the world market, for the conveyance of oil, water, molasses and chemicals.[35] The tanker has been chartered by both domestic and foreign corporations. Since her transfer to Suffolk in 1957, the *Estrellita* has spent only about 26 percent of her total operation time in voyages on which she entered United States ports.[36] The Board found that Suffolk was merely an instrumentality of Oil Transfer, and thus, despite Panamanian incorporation, Suffolk was essentially a domestic United States

[34] This decision is set forth in Appendix B, *infra*, pp. 75–81.

[35] Oil Transfer, which formerly owned the *Estrellita* when it was under American registry, is engaged in the operation of American flag vessels carrying bulk liquids in United States coastal trade.

[36] During the first two years of such operations, the tanker remained almost exclusively in Sumatra working under charter to a Dutch oil company. However, during the year preceding the filing of the representation petition, she was chartered primarily to American shippers and thus a large majority of her voyages touched United States ports.

enterprise. Nevertheless, the Board concluded that the *Estrellita* did not have such substantial contacts with the United States as would render the Act applicable.

The Board pointed out that, in applying the substantial contacts test, the problem is one "of evaluating the many aspects of the operation and determining whether or not the shipping involved is essentially that of this nation and not that of a foreign nation * * *" (137 NLRB No. 48, p. 3, quoting from *United Fruit Company*, 134 NLRB No. 25, p. 3). Thus, the Board explained that it has looked to the national connections of a ship's owner-operator insofar as these may show the nationality of the commercial activities in which the ship is involved. But, in the Board's view, "The situation here is different, however, in that it is the business operations of the charterers, who may or may not be U.S. nationals, and not that of Suffolk, which determines in what commerce the *Estrellita* will sail. Indeed, under the type of charter operations here involved, the U.S. connections of the owner-operator, though showing some U.S. interest in the ship, do not in themselves demonstrate sufficiently substantial U.S. contacts to confer jurisdiction. Simarly, the physical contacts of the vessel to the United States do not evince substantial ties to the commerce of this nation. Thus, the physical contacts derive not from the connection which the ship and its operation have to the owner-operator's fixed U.S. enterprise, but rather from the charter's business; and the charterer, to reiterate, is whoever

happens to charter the vessel" (137 NLRB No. 25, p. 4).[37]

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In sum, the Board has held the Act applicable to foreign flag ships, where, after evaluating all of the aspects of the operation, it has concluded that the shipping involved is essentially that of this nation rather than of a foreign nation. In making this evaluation, the Board has looked at such factors as: (a) the nationality of the beneficial owner of the ship; (b) whether the operations of the ship are directed primarily from the United States; (c) the regularity and frequency of its visits to United States ports, and the nature of the cargo and passengers carried; (d) where the ship is provisioned and repaired; and (e) whether the ship carries the trade of its flag country, and, if so, whether such trade is merely a concomitance of the American beneficial owner's business operations. We submit that the line drawn by the Board, between foreign flag ships which come under the Act and those which do not, is a reasonable one. It results in bringing within the Act those ships which, despite their foreign registration and foreign crew, are closely

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[37] The Board distinguished the situations in *United Fruit* and *Peninsular & Occidental*, "where the foreign corporations chartered their vessels only to U.S. corporations to which they were related for the continuing use of such corporations as an adjunct of their U.S. located commerce. Consequently, the ships by the very nature of the business in which they were involved regularly traded with U.S. ports, and barring some wholly unforeseen change would continue to do so" (137 NLRB No. 25, p. 4, n. 8).

linked with the American economy, while, at the same time, it results in excluding those which are not. Furthermore, the test applied by the Board is a workable one (cf. *Amicus* Brief of the United Kingdom in Nos. 91 and 93, p. 8, Brief for Petitioner in No. 33, pp. 35–36). The cases already decided have indicated

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[58] There is no basis for the fear that the Board's test would even bring the *Queen Mary* under the Act (see Brief for Petitioner in No. 33, this Term, pp. 33–34). The fact that a vessel makes regular visits to United States ports is only one factor to be considered, and, in the case of a vessel like the *Queen Mary*, it is clearly outweighed by the other factors which show that the shipping operation is truly, not that of the United States, but of a foreign nation—e.g., British flag, British crew, British ownership and direction, engaged in substantial British trade. See *Eastern Shipping Corp.*, 132 NLRB 930, 933; *United Fruit Company*, 134 NLRB No. 25, p. 3, n. 10 (IR. 16, IR. 39); *Dalzell Towing Co.*, 137 NLRB No. 48, p. 4, n. 7; Brief for Respondent in No. 33, this Term, pp. 22–23.

On the other hand, the Board is of the view that it is not so clear that the vessels involved in *Incres Steamship Company, Ltd.* v. *International Maritime Workers Union*, No. 33, this Term, do not possess those substantial ties with the United States which would bring them under the Act. Thus, although they are owned by an Italian corporation, they operate similar to the cruise ships in *Eastern*, *supra*, and they appear to have a similar relationship with an American agency. See Brief for Respondent in No. 33, this Term, pp. 4–8; Record in No. 33, p. 285. Accordingly, the Board believes that the Court of Appeals of New York correctly concluded that the operations of the Incres vessels were "arguably" subject to the NLRA, and hence, under familiar preemption principles, the state courts were without jurisdiction to enjoin the union's organizational activities with respect to those vessels. This Court's recent decision in *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, shows that the preemption principles apply to questions of the Act's coverage and jurisdiction no less than to questions of substantive law, at least where, as here, the question requires the evaluation of facts and criteria by the Board.

the relevant factors and they are capable of ready ascertainment; hence, by now it can be determined, with a fair degree of accuracy, whether a particular foreign flag vessel is within or without the ambit of the Act, and, as more cases are decided by the Board, the answer will become even more certain.

C. Neither this Court's decision in Benz, *the so-called "internal order doctrine," nor the fact that the Act does not specifically refer to foreign flag vessels precludes application of the Act to such vessels*

1. The conclusion that the Act applies to foreign flag vessels having substantial contacts with the United States is not inconsistent with *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138. That case involved the *S.S. Riviera*, a vessel owned by a Panamanian corporation, sailing under the Liberian flag. It was manned by a foreign crew, primarily German and British, who had signed a British form of articles at Bremen, Germany, under which the crew agreed to serve on a two-year voyage originating at Bremen and terminating at a European port. While the vessel was temporarily docked at Portland, Oregon, for repairs and to load a cargo of wheat, the crew struck over wages and conditions on the ship, and three American unions picketed the vessel. A diversity suit was brought in a Federal district court in Oregon, for an injunction and damages against representatives of the three unions. The district court enjoined the picketing and awarded damages.[39] By the time the case came to this Court, the vessel had sailed, and, as far

[39] The judgments were predicated upon the theory that the picketing was for an unlawful purpose under Oregon law.

as appeared, had never again returned to an American port. This Court, rejecting the contention that the Act applied to the controversy and that the district court thus lacked jurisdiction, sustained the judgment for damages.

The Court pointed out that, although Congress had power to apply the Act to labor conditions on a foreign ship, in view of the delicate problems of international relations which this would create clear evidence of such an intent should be required. In the Court's view, there was no indication that Congress intended to bring disputes like the one presented within the coverage of the Act. The Court's opinion could be read as a flat holding that the Act is inapplicable to all foreign flag ships. We do not believe, however, that the Court intended to decide more than the fact situation before it. Thus, at the outset of its opinion, the Court stated that the only question decided was whether the Act "applies to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is *temporarily* in an American port" (353 U.S. at 138-139, emphasis added). And, later on, the Court added that the dispute "arose on a foreign vessel * * * was between a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation. The only American connection was that the controversy erupted while the ship was *transiently* in a United States port and American labor unions participated in its picketing" (353 U.S. at 142, emphasis added). In these circumstances, and since the

Court was not afforded an opportunity to consider the problem in all of its various forms, we interpret *Benz* as deciding merely that the Act was inapplicable to a foreign flag ship whose points of contact with the United States were as insubstantial as those of the vessel there.[40]

Benz has been so interpreted by all of the courts which have had occasion to consider it, with the exception of the District Court in No. 107 which interpreted it broadly (IIR. 65–66). Thus, the court of appeals in Nos. 91 and 93, the court in *Incres*, No. 33 (including Judge Fuld who dissented),[41] and the Pennsylvania Supreme Court in *Navios Corp.* v. *National Maritime Union*, 402 Pa. 225, 116 A. 2d 625, certiorari denied, 366 U.S. 905,[42] have all viewed *Benz* as not ruling out the applicability of the Act to foreign flag ships having substantial points of contact with the United States. Moreover, in *Marine Cooks* v. *Panama Steamship Co.*, 362 U.S. 365, this Court emphasized the limited nature of *Benz*, in holding that the Norris-La Guardia Act barred the issuance of an injunction in a labor dispute involving a foreign flag ship. The Court stated that *Benz* decided only that

[40] It is appropriate to recall that the doctrine of the particular case "is not allowed to end with its enunciation and * * * an expression in an opinion yields later to the impact of facts unforeseen." *Jaybird Mining Co.* v. *Weir*, 271 U.S. 609, 619 (Brandeis, J. dissenting).

[41] See the Record in No. 33, pp. 288, 293–294.

[42] In *Navios*, it was held that the state court lacked jurisdiction to enjoin picketing by an American union of a Liberian ship, which was owned by a foreign subsidiary of United States Steel Corporation and was utilized to carry iron ore from Venezuela to the latter's plant in Pennsylvania. The controversy was found "arguably subject" to the NLRA.

the Act did not govern "the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened *temporarily* to be in American waters" (362 U.S. at 369, emphasis added).

2. In the foreign flag cases before the Board, including the one involved in this litigation, it has been urged that the points of contact principle articulated in *Lauritzen, supra*, though appropriate for determining the law applicable to maritime tort claims, are not appropriate for a statute governing labor relations. Such a statute, the argument runs, entails regulating the "internal order" of a ship, and, under principles of international law, jurisdiction over these matters rests exclusively with the flag state. There is no merit to this contention.

First, the internal order doctrine appears to be nothing more than a part of the general rule that cardinal weight should be accorded the laws of the flag state. For, in *Lauritzen*, this Court discussed the internal order doctrine simply as part of its discussion of flag law generally (see 345 U.S. at 584–586). Accordingly, if, as we have shown, the flag law doctrine would not preclude the weighing of points of contact, neither should the internal order doctrine.

Second, even if the internal order doctrine were entitled to separate consideration, it would have no application here. The historical statement of the doctrine is that "all matters of discipline and all things done on board which affected *only* the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of

the port, should be left [to the authorities of the flag nation]." [Emphasis added.] *Wildenhus' Case*, 120 U.S. 1, 12. See also, *United States* v. *Flores*, 289 U.S. 137, 158; *Lauritzen* v. *Larsen*, 345 U.S. 571, 585–586. A labor dispute involving a foreign flag ship having substantial contacts with the United States extends well beyond the internal economy of the vessel. It would tend to obstruct the flow of commerce into the United States, thereby disrupting "the peace * * * of the country [and] the tranquility of the port." And, it would clearly be a matter of vital concern to American seamen working on American ships. See *Marine Cooks & Stewards* v. *Panama Steamship Company*, 362 U.S. 365, 371.

Moreover, it cannot be assumed "that application of the Labor Act to seaborne commerce involves any interference in the internal order and discipline of a vessel—at least of the kind that the internal order doctrine is intended, under appropriate circumstances, to preclude." *West India Fruit and Steamship Co.*, 130 NLRB 343, 357. The purpose of the doctrine is to preclude limitations on the traditional right of the master of a vessel to punish mutiny and otherwise discipline his crew, and to control the passengers.[42a] The Board has no power under the Act to intrude on these matters. Cf. *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U.S. 31; *P & O Steamship Co.* v. *National Labor Relations Board*, 98 F. 2d 411 (C.A. 5), certiorari denied, 305

[42a] See McDougal, *et al.*, *The Maintenance of Public Order at Sea and the Nationality of Ships*, 54 Am. J. Int'l law 25, 82–84 (1960).

U.S. 653. As the Board pointed out in *West India*, 130 NLRB at 357:

> Clearly, there is nothing in the Act that prescribes what working conditions must exist upon a vessel or directs a shipowner or a master as to the manner in which the disciplinary problems shall be handled. To be sure, the Act's bargaining obligation may indirectly result in such matters being dealt with in a labor agreement, but the terms of such an agreement at least to the extent they deal with internal order and discipline are the private agreements of the parties to the contract; they are not prescribed by any provision of the Act.

3. Nor is there merit to the contention (see Brief of Petitioner in No. 33, pp. 27–32) that the Act should not be construed to cover foreign flag vessels because there is no specific indication, in either its provisions or legislative history, that Congress intended to cover such vessels. The fact that the Act does not specifically include foreign flag vessels can hardly be decisive, for the statute contains no express inclusions; rather, the plan of the statute is that jurisdictional coverage shall be determined—except for certain well stated exceptions (see Sections 2(2) and 2(3))—not by the character or location of the operation involved, but by its "effect" upon commerce (see supra, pp. 22–24).[43] Indeed, in neither the Jones Act (construed in *Lauritzen, supra*) nor in the Seamen's

[43] As Mr. Justice Holmes observed in an analogous situation, "the question is not whether they were thought of for the purpose of inclusion, but whether they were intentionally excluded from a description that on its face includes them." *Unwin* v. *Jarka Co.*, 282 U.S. 234, 239.

Act of 1951 and the amendments thereto (construed in *Sandberg* v. *McDonald*, 248 U.S. 185, and *Strathearn Steamship Co.* v. *Dillon*, 252 U.S. 348, see IR. 74), did Congress specifically indicate whether, and to what extent, it desired to cover foreign flag ships; it merely used general language, thereby leaving it to the courts to determine the issue in the light of the nature and purpose of the enactment, and the factors of United States and foreign interest present.

The Maritime Labor Act does not require a contrary conclusion. That statute (52 Stat. 965 (1938), amended 55 Stat. 259 (1942))—which is no longer in effect—set up a Maritime Labor Board for the purpose of mediating maritime labor disputes, encouraging the making and maintenance of written collective agreements in that industry, and preparing a comprehensive plan for the amicable adjustment of maritime disputes. Since this statute was viewed as a supplement to the NLRA and it was expressly limited to vessels "documented, registered, licensed or enrolled under the laws of the United States," it has been argued that this shows that Congress must have intended to limit the NLRA to these kinds of vessels too. But, since the MLA was enacted subsequent to the NLRA and contains limiting language while the latter does not, it is more reasonable to conclude that it was only with respect to the relatively narrow functions conferred on the Maritime Labor Board that Congress desired to limit coverage to American flag vessels. In this connection, it is significant that the MLA specifically provided (Sec. 1002) that: "The provisions of this title shall not in any

manner affect or be construed to limit the provisions of the National Labor Relations Act, nor shall any of the unfair labor practices listed therein be considered a dispute for the purposes of this title. Questions concerning the representation of employees of a maritime employer shall be considered and determined by the National Labor Relations Board in accordance with the provisions of the National Labor Relations Act."

Moreover, it should be noted that in 1959 Congress enacted Section 14(c)(1), which provides that "the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." Under those standards, the Board would have asserted jurisdiction over foreign flag vessels engaged in the volume of commerce, and having the substantial United States contacts, of those here. Thus, as of August 1, 1959, the Board had determined that it would assert jurisdiction over all "freight enterprises engaged in the furnishing of interstate transportation services which derive at least $50,000 gross revenue per annum from such operations." *H.P.O. Service, Inc.*, 122 NLRB 394." And, the Board had already exercised jurisdiction over, and ordered elections on, the Peninsular & Occidental foreign flag ships discussed *supra* (120 NLRB 1097), and a complaint had been issued in the *West India* case, *supra*.

"There is evidence that Congress was familiar with this standard. II Legislative History of the Labor-Management Reporting and Disclosure Act, 1959 (G.P.O., 1959), 1153(3)-1154(3): 105 Cong. Rec. 6548-6549.

II. APPLICATION OF THE ACT TO FOREIGN FLAG VESSELS WOULD NOT IMPAIR TREATY OBLIGATIONS, NOR ADVERSELY AFFECT NATIONAL DEFENSE AND INTERNATIONAL RELATIONS

A. *Application of the Act would not impair treaty obligations*

In the courts below (IR. 6, 63–64; IIR. 5, 42–43), it was asserted that application of the Act to the vessels here would impair the obligations contained in the Treaty of Friendship, Commerce, and Consular Rights between the United States and Honduras, signed on December 7, 1929, and proclaimed on July 23, 1928. Thus, Article XXII of the treaty provides in part as follows (45 Stat. 2634):

> A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

The representation proceeding before the Board, it is argued, abridges this provision for it will affect the internal order of the vessels involved, and thereby invade the exclusive jurisdiction of the Honduran Consul over this subject. But, as we have shown (pp. 39–41), Board determination of a bargaining representative does not impinge on the area normally encompassed by the internal order doctrine. Moreover, the treaty provision itself confirms that wages

and working conditions embodied in a contract are not aspects of a vessel's internal order. The provision vests the Consul with the exclusive jurisdiction over matters arising out of the internal order and matters pertaining to discipline, but eliminates the "exclusive" factor, and provides in effect for concurrent jurisdiction, in matters pertaining to wages and the execution of contracts.

Nor does Board assertion of jurisdiction impair Article X of the treaty, which provides (45 Stat. 2625):

> Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

This provision states no more than that the Honduran flag flown by the vessels here and their possession of Honduran registration papers are absolute proof of their Honduran nationality. But, as already pointed out, the Board, in asserting jurisdiction over a foreign flag ship, does not deny the vessel's foreign nationality but merely decides that, in view of the vessel's substantial contacts with the United States, it should be subjected to the labor laws of this nation.[45] As the Board stated in *West India Fruit & Steam-*

[45] Honduras, for example, would of course remain free to continue to regulate the registration forms of the vessel, collect fees and taxes, and provide for consular protection in foreign ports.

ship Co., 130 NLRB 343, 359: "There is nothing inconsistent between our recognizing the foreign nationality of a foreign flag vessel, and the application of the Act in those situations where the foreign state in effect permits its vessels to be operated as an integral part of an essentially domestic enterprise engaged in a continuing and immediate manner in both the foreign and domestic commerce of this nation." [46]

B. There is no substantial basis for the assumption that defense policies served by maintenance of a Panlibhon fleet would be subverted

Before the Board, the Attorney General of the United States, on behalf of the Secretary of De-

[46] Identical treaty provisions have been held not to bar application of the Norris-LaGuardia Act (see *Afran Transport Co.* v. *Maritime Union*, 169 F. Supp. 416, 420, 425 (S.D. N.Y.)), nor the Jones Act (see *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927, 929–930 (C.A. 2), certiorari denied, 287 U.S. 642), to foreign flag ships.

Note, moreover, the Geneva Convention on the High Seas, ratified by the United States but not yet effective for lack of required ratification by 22 nations. Article 5, § 1 provides that "Ships have the nationality of the State whose flag they are entitled to fly," but adds that: "There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." The "genuine link" requirement as adopted was less stringent than proposals made by such governments as the United Kingdom and the Netherlands, which would have enabled states other than the flag state to withhold recognition of the national character of a ship if they considered there was no "genuine link" between the state and the ship. See IR. 79–80; Jessup, *The Law of the Sea*, 59 Col. L. Rev. 234, 255–257 (1959). The position of the United Kingdom then is in striking contrast to its position now that the flag shall be decisive of the law to be applied in these cases (see *Amicus* Briefs for the United Kingdom in No. 33, and in Nos. 91 and 93).

fense,[47] contended that, if the Act were applied to foreign flag vessels such as those here, the economic incentive for American interests to register their ships in Panama, Liberia and Honduras (the Panlibhon countries) would be destroyed, and these ships would then be transferred to other countries where they would no longer be available to the United States in time of emergency. The Board, after careful consideration, properly concluded that this contention did not warrant it in declining to apply the Act to foreign flag vessels having substantial contacts with the United States.

The argument—which appears to be directed not to the Board's legal power over foreign flag ships but to policy reasons why that power should not be exercised[48]—is applicable only to that portion of the American-controlled Panlibhon fleet which was not originally under American registry, for the portion which was could not transfer from their Panlibhon flags absent Maritime Administration approval (see n. 16, p. 19, *supra*). As to the former portion of that fleet,

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[47] The Board permitted the Attorney General to intervene in the *West India* and the three other foreign flag cases then pending (including *United Fruit*). The Attorney General presented on behalf of the Department of State and Department of Defense certain considerations of international law and national defense policy bearing upon issues common to those cases. (IR. 9; HR. 31–32.)

[48] Indeed, in his brief to the Board the Attorney General stated (p. 20): "In submitting the policy considerations of the Department of Defense, we recognize that they should not be deemed determinative of the Board's legal jurisdiction which depends exclusively upon legal principles. The views of the Department of Defense are pertinent in suggesting that the claimed advantages of Board jurisdiction to American seamen may be illusory."

the argument rests on several assumptions which do not stand up under scrutiny."[a]

1. As the Board pointed out in *West India*, the argument assumes "that the major overriding factor motivating American shipping interests to turn to Panlibhon registration is the desire to escape the jurisdiction of the Labor Act" (130 NLRB at 366). However, in view of the many economic incentives in such registration (see p. 20, *supra*), this conclusion is unjustified. For example, there are substantial savings in taxes and vessel maintenance cost which flow from Panlibhon registry, and these would be lost if the shipowner transferred to British or Norwegian registry; it seems highly unrealistic to conclude that the mere assertion of Board jurisdiction over labor-management relations on Panlibhon ships would prompt the shipowner to forego these advantages, particularly since Board jurisdiction does not insure that a union will be certified as the representative of his employees, and, even if one were, the shipowner is not compelled to agree to any particular contract with it.

2. The Department of Defense argument rests on the further assumption that Board assertion of jurisdiction over foreign flag vessels would be limited to those of Panlibhon registry, so that the shipowner, by transferring to another registry, could elude the Act. However, the Board indicated in *West India* that its conclusion there would have been the same even if the

[a] It should also be noted that the maintenance of a "flag of convenience" fleet does not rest on any stated congressional policy. To the contrary, Congress, in the Merchant Marine Act of 1936 (46 U.S.C. 1101), expressed a national policy in favor of building up an American flag fleet, manned by citizen personnel. See *West India*, 130 NLRB at 367–368.

vessel had been under another flag. "Clearly, she would find no sanctuary in European registry if those American contacts warranting application of the Act remained otherwise substantially unchanged. Consequently, as European documentation would provide no inevitable 'escape' from the Labor Act, we fail to see how its application would necessarily encourage shipping operators to abandon Panlibhon registry with its many economic advantages" (130 NLRB at 367). And, as the Board added in *United Fruit*, 134 NLRB No. 24, p. 3 (HR. 12; HR. 34): "* * * the particular flag of nationality of the vessels involved, as such, plays no role in our determinations. Whether the flag or nationality be from our own hemisphere or across the seas, the controlling criteria are the same."

3. The portion of the Panlibhon fleet which is controlled by American interests and which can be transferred from that registry without prior Maritime Administration approval is deemed to be under effective United States control largely because the American owners have voluntarily agreed to make them available to this country in time of emergency, and there is little likelihood that those nations would need such ships for their own use in that event.[49] To assume

[49] See n. 16, p. 19, *supra;* Project Walrus Report, op. cit., pp. 57–58.

However, the soundness of the effective control principle has been questioned, on the ground, *inter alia*, that the foreign crews on the Panlibhon ships may either refuse to serve in wartime or defect and deliver some ships into enemy hands. See Project Walrus Report, p. 57; *Hearings on Ship Transfers to Foreign Flag*, Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess. (1957), pp. 3, 53, 74–77, 125–126;

that, if the American owners transferred the ships to another registry, they would no longer desire to help the United States in time of need, unduly depreciates the patriotism of these owners. Moreover, if the "new" flag country were a member of the NATO Treaty Organization, as is likely, the ships, or their equivalent, would still be available to the United States. For the NATO nations have agreed to commit the preponderance of their merchant shipping to a common pool in the event of a war affecting its members.[50]

In essence, the Department of Defense argument rests on the premise that application of the Act to maritime operations is disruptive of the free flow of commerce because it creates burdens which are competitively disadvantageous. But, as the Board pointed out (*West India*, 130 NLRB at 370):

> This argument would be as equally applicable to American as to foreign flag shipping. In fact, it would appear to apply with equal force in all those situations involving an enterprise affecting national defense and subject to foreign competition of countries with lower business taxes than, and terms of employment inferior to, those prevailing in this country. * * *

Yet, it could hardly be suggested that the Board should decline jurisdiction in all national defense industries which, *vis-a-vis* their European counterparts, are in a competitively disadvantageous economic situation. The assumption of Congress in enacting the

Hearings on Vessel Transfer, etc., House Committee on Merchant Marine and Fisheries, 85th Cong., 1st Sess., pp. 553, 601–602.

[50] See Project Walrus Report, p. 30.

Act was that application of its procedures would, by eliminating the causes of labor unrest, promote, rather than impede, the free flow of commerce. And, "it best effectuates the policies of the Act to assert jurisdiction over all enterprises * * * whose operations exert a substantial impact on the national defense. * * * [For in this area, the Board] has a special responsibility, as a Federal agency, to reduce the number of labor disputes." *Ready Mix Concrete & Materials, Inc.*, 122 NLRB 318, 320.

Finally, it is necessary to balance against the highly speculative consequences to our effective control over Panlibhon shipping of applying the Act to such shipping, the effects of not applying the Act. The latter course would not promote labor-management peace. On the contrary, it is likely that American unions would continue to picket Panlibhon vessels, and, in concert with longshore unions and the International Transport Workers Federation, to exert economic pressure against them, both at home and abroad. The peaceful procedures of the Act would not be available for resolving the representation and unfair labor practice questions underlying the labor dispute, nor, could the shipowner, under *Marine Cooks and Stewards* 362 U.S. 365, obtain an injunction in the federal courts. The result would be to leave the parties to their economic weapons, which could have a serious impact on the commerce of this nation, and encourage the shipowner or shippers to resort to state courts in an effort to find one which would enjoin the union activity.[51] It is certainly not conducive to the

[51] Or if the picketing could be shown to have secondary effects, a charge alleging a violation of Section 8(b)(4)(B) of

peaceful resolution of labor disputes and to the development of a uniform national labor policy to leave matters in this uncertain condition. Nor, in the area of international relations where a national policy is particularly desirable, does it seem appropriate to entrust the state courts, rather than the Board with its centralized administration, with the task of determining whether and to what extent American unions should be permitted to engage in organizational activities with respect to foreign flag ships having substantial points of contact with the United States.

C. The contention that application of the Act would unsettle international relations

The Department of State contended before the Board (see n. 47, *supra*), that application of the Act to Panlibhon shipping would unsettle our relationships with nations friendly to the United States.[52] This contention appears to rest on these assumptions: (1) that the Board would apply the Act only to Panlibhon ships and not to other foreign flag ships;

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the Act might be filed with the Board and an injunction obtained under Section 10(l). See *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 148 (Douglas, J. dissenting); *Teamsters Union* v. *New York, N.H. & H.R. Co.*, 350 U.S. 155. This would place the union in the unhappy position of being subjected to the Act's restraints, without being able to avail itself of the Act's benefits.

[52] The district court in No. 107 also requested the views of the Department of State with respect to the protest note of the Honduran Ambassador attached to the complaints in the subject litigation (IIR. 42–45). The Department's response was that, although it "does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case" (IIR. 50).

(2) that application of the Act would collide with laws which the Panlibhon countries themselves had enacted; and (3) that these countries would be prompted to take retaliatory measures against the United States.

As we have shown (pp. 48–49), the first assumption is groundless; the Board's position is not limited to Panlibhon ships, but applicable to any foreign flag ship having substantial points of contact with the United States. The third assumption is highly speculative and affords no substantial basis for declining to give the Act the reach which it otherwise seems to have, and which would effectuate its policies.[53]

As for the second assumption, Liberia does not appear to have any laws which would cover the area encompassed by the Act (see Brief for Respondent in No. 33, pp. 52–53). Moreover, the conflict with Liberian laws, as well as with those of Panama (see *Amicus* brief for Panama in No. 33, pp. 7–8), would be more theoretical than real, for the American-controlled vessels registered in those countries generally never visit them nor carry any of their trade (see, e.g., the *West India* and *Peninsular & Occidental* cases, *supra,* and also *Incres,* No. 33, this Term). However Honduras does have laws which apparently would conflict with the Act (IR. 5; IIR. 4),[54] and the

[53] A similar contention by the State Department did not deter this Court from concluding that the term "possession" in the Fair Labor Standards Act should be interpreted to include land leased from Great Britain in Bermuda, which remained under the sovereignty of that country. *Vermilya Brown Co. v. Connell,* 335 U.S. 377, 401–402.

[54] The laws were enacted in June 1959, after the Board decision in *Peninsular & Occidental,* 120 NLRB 1097, had indi-

ships here do visit Honduras and carry some of its trade (although as an incident of United Fruit's operations). But, this is a burden which the shipowner must bear as a consequence of doing business in a manner which subjects him to the laws of two sovereignties.[55] That is, if, as we have shown, Congress intended the Act to reach labor-management relations on foreign flag vessels having substantial points of contact with the United States, the shipowner cannot be relieved of his obligation to comply with American law merely because another law may impose conflicting requirements.[56]

III. THE BOARD PROPERLY CONCLUDED THAT THE VESSELS INVOLVED IN THIS PROCEEDING HAD SUFFICIENT POINTS OF CONTACT WITH THE UNITED STATES TO BRING THEM UNDER THE ACT

As noted (pp. 11–13), the court of appeals in Nos. 91 and 93 agreed with the principle that the Act may apply to foreign flag vessels which have substantial points of contact with the United States, and these outweigh the foreign contacts. However, it disagreed

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cated that the Board was asserting jurisdiction in this area. See Legislative Service, ILO (May–June 1960), *Honduran Labour Code.*

[55] The Honduran laws did not deter the Honduran union, Sindimar, from participating in the Board proceeding and from having its name placed on the ballot in the Board election (IR. 17, 18–19; IIR. 39, 41). See also, *Hamilton Bros., supra.*

[56] Nor is any due process problem presented by the possibility that, if a new representative is certified by the Board, Empresa's outstanding contract with Sociedad (which was renewed while the Board proceeding was in progress) would be impaired (see IR. 7; IIR. 6). See *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 337; *Local 1545, United Bro. of Carpenters* v. *Vincent*, 286 F. 2d 127 (C.A. 2).

with the Board's conclusion that the United States contacts of the vessels here were predominant. We submit that the court erred in rejecting the Board's conclusion.

It is clear that the vessels here are engaged in the foreign commerce of the United States. As shown in the Statement (pp. 3–7), UFCO is primarily concerned with the raising of tropical produce, and with its transportation to market and sale. The vessels regularly ply between Central and South American locations and United States ports. On the trips to the United States, they carry produce from UFCO's Latin American plantations for sale in the United States. On their return trips to Latin America, they carry cargo for various UFCO subsidiaries, and also some general cargo for shippers and consignees outside the UFCO organization.

The vessels, however, are not owned by UFCO, but by Empresa, a Honduran corporation, which time charters the vessels to UFCO. Empresa carries out the typical responsibilities of an owner under a time charter, including hiring the officers and crews, payment of wages, and discipline of the personnel. The Board found that, nevertheless, the relationship between Empresa and UFCO was such that Empresa's maritime operations constituted part of an integrated operation under the ownership and control of UFCO, and UFCO was in effect a "joint employer" of the seamen involved. The court of appeals, on the other hand, found "the Board's statement that United Fruit is a 'joint employer' to be an erroneous legal conclusion, which must be disregarded" (IR. 62, n. 3). The Board's finding was entitled to stand, in the light of

these other facts concerning the UFCO-Empresa relationship:

1. Empresa is a wholly-owned subsidiary of UFCO; its directors are elected by UFCO; it does not carry passengers or cargo on its own account, but derives virtually all of its income from chartering its vessels to UFCO.

2. The Empresa vessels are wholly integrated in UFCO shipping operations. Thus, UFCO charters from one of its United States subsidiaries or owns outright a number of cargo ships registered under United States law. These ships, like Empresa's, are under the jurisdiction of UFCO's Marine Division, and the two groups of vessels are used interchangeably, carrying the same types of cargoes and calling at the same ports, both domestic and foreign. In assigning a vessel to a particular run, the determination as to which vessel to use is based on its availability, size and speed, not on its ownership or flag.

3. Although Empresa is responsible for the crew and for certain other matters, UFCO controls the remaining phases of the vessels' operations. Thus, betterments for the vessels, and the purchase or scrapping of vessels are handled by UFCO. UFCO determines what voyages the vessels will make, their ports of call, their length of stay in various ports, and what cargoes they will carry. In exercising its control, UFCO deals directly with the particular vessel's captain. Supplies are purchased both in foreign nations and the United States, and purchases in the United States are made from Maratrop Trading Corporation, a wholly-owned UFCO subsidiary.

4. Under settled authority, these facts would clearly justify a finding that Empresa and UFCO constitute an integrated operation or a single or joint employer for purposes of the Act. See *A. M. Andrews Co.* v. *National Labor Relations Board*, 236 F. 2d 44, 45 (C.A. 9); *National Labor Relations Board* v. *Jones Sausage Co.*, 257 F. 2d 878, 880 (C.A. 4); *National Labor Relations Board* v. *Concrete Haulers, Inc.*, 212 F. 2d 477, 479 (C.A. 5); *National Labor Relations Board* v. *Calcasieu Paper Co., Inc.*, 203 F. 2d 12, 13 (C.A. 5); *National Labor Relations Board* v. *Somerset Classics, Inc.*, 193 F. 2d 613, 614–615 (C.A. 2), certiorari denied, 344 U.S. 816.[57] For "the many tiny strands of [UFCO] control * * * cannot be extricated from the total fabric of mutual obligation." *Local 24, Teamsters* v. *National Labor Relations Board*, 266 F. 2d 675, 680 (C.A. D.C.). Cf. *National Labor Relations Board* v. *Deena Artware, Inc.*, 361 U.S. 398, 402–404.[58]

[57] See also, *National Labor Relations Board* v. *A. E. Nettleton Co.*, 241 F. 2d 130 (C.A. 2); *National Labor Relations Board* v. *Price Valley Lumber Co.*, 216 F. 2d 212, 213–214 (C.A. 9), certiorari denied, 348 U.S. 943; *National Labor Relation Board* v. *National Shoes, Inc.*, 208 F. 2d 688, 691 (C.A. 2).

[58] Cf. *Bowater Steamship Co.* v. *Patterson*, 303 F. 2d 369, 372–373 (C.A. 2), where, in treating a foreign subsidiary and its American parent as one for purposes of the Norris-LaGuardia Act, the court observed: "Whether a subsidiary corporation is to be considered a separate entity 'cannot be asked, or answered, *in vacuo*' * * *; the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law. * * * As the Supreme Court has repeatedly taught, the policy behind the Norris-LaGuardia Act was a strong one; we cannot think Congress would have meant this to be defeated by the fragmentation of an integrated business into a congeries of corporate entities, however much these might properly be respected for other purposes." The

Accepting the Board's finding that UFCO was a joint employer with Empresa of the seamen on the vessels here, we believe that the foreign factors relied on by the court are not entitled to the same weight which it assigned them, and therefore they do not override the otherwise substantial points of contact with the United States. Thus, the court relied, *inter alia*, on "the vessels' regular visits to Honduras, the Honduran corporate identity—admittedly not fictitious—of the owner," and the fact that the vessels, though "engaged in the foreign commerce of the United States, * * * are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed for the purpose here at issue, by Honduras' interests" (IR. 77). But, if it is recognized, as the Board found, that the operations of the Honduran "subsidiary are designed essentially to further the shipping operations of the parent and not * * * an independent undertaking whose success or failure is gauged by [Empresa's] role in the open market" (IR. 15; IIR. 38), the visits to Honduras and the trade with that country take on a different character. As the Board pointed out in *Hamilton* (*supra*, p. 31), they are not the result of a truly foreign venture serving the shipping needs of that country, but rather merely "a concomitance of * * * shipping operations in the area of American international trade." In

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policy behind the National Labor Relations Act, we submit, is no less strong.

these circumstances, the Board was not unreasonable in concluding that those contacts with Honduras were insufficient "to require a finding that the operations are essentially the shipping of a foreign nation, and, thus, outside the coverage of the Labor Act" (*ibid.*). On the contrary, on the amply supported findings of the Board, Empresa's maritime operations were but an essential part of the UFCO enterprise, an American corporation, located in and directed from the United States (IR. 16; IIR. 38).

CONCLUSION

For the foregoing reasons, the Board's direction of election was valid and proper. The judgments of the courts below should thus be reversed and the complaints dismissed.

Respectfully submitted.

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The United States intends to file a brief *amicus curiae* setting forth its position in these cases and in the related case of *Incres Steamship Co. Ltd.* v. *International Maritime Workers Union, et al.* (No. 33). While the United States disagrees with the Board's

conclusion that the National Labor Relations Act applies in the present cases, the Solicitor General has authorized the Board to file this brief urging reversal, since the agency is defending its own decision.

ARCHIBALD COX,
Solicitor General.

OCTOBER 1962.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, U.S.C. 151, *et seq.*)

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bar-

gain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

* * * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or

any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

SEC. 9 * * *

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative define in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists

shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

SEC. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for

appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618:

ARTICLE 10:

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

* * * * *

ARTICLE 22:

A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

* * * * *

APPENDIX B

OWENS-ILLINOIS GLASS COMPANY, EMPLOYER

and

UNITED MARINE DIVISION, NMU, AFL–CIO, LOCAL 333, PETITIONER

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before M. E. Stadler, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. *Jurisdiction.* The Petitioner seeks an overall unit of employees aboard the Employer's tugs *Linden* and *Parris Island* and barges *Pulpwood No. 1* and *Pulpwood No. 2.* Though the Employer concedes that it is engaged in interstate commerce within the meaning of the Act, it contends that the Board does not have and should not assert jurisdiction over the operations of the above-named vessels as they are of foreign registry and manned exclusively by non-resident aliens and, in the case of the *Parris Island,* that tug does not operate in American waters.

The Employer is an Ohio corporation doing business in several states including Florida. During the past year the Employer purchased and received from without the State of Florida raw materials valued in excess of $50,000. During the same period the Employer shipped to points outside Florida paperboard and other finished products valued in excess of $50,000.

The vessels in questions are engaged in transporting pulpwood between the Bahamas and Jacksonville, Florida. The wood is cut in the Bahamas by Owens-Illinois Glass Company of the Bahamas, Limited, hereinafter referred to as Owens-Illinois-Bahamas, a wholly-owned subsidiary of the Employer, and is sold to the Employer. A single individual, James W. Haley, manages both the Marine Department of Owens-Illinois Glass Company, the owner-operator of the vessels, and its foreign subsidiary, Owens-Illinois-Bahamas, from a single office at 4300 Talleyrand Avenue, Jacksonville, Florida.

Owens-Illinois-Bahamas delivers the cut wood to a dock at Snake Cay in the Bahamas and loads it onto the barges *Pulpwood No. 1* and *No. 2*. The tug *Parris Island*, of Honduran registry, then tows the pulpwood-laden barges to Matanilla Shoals where it is transferred to the Liberian-registered tug *Linden* for towing to Jacksonville. At Matanilla Shoals the *Parris Island* receives an empty barge from the *Linden*. Thus, with the exception of one trip a year to Florida for purposes of dry docking, the *Parris Island* does not touch the continental United States. Moreover, the deep draft of the *Linden* prevents its making the voyage between Snake Cay and Matanilla Shoals.

The *Parris Island* carries a complement of ten unlicensed crewmen, the *Linden* thirteen, and the *Pulpwood No. 1* and *Pulpwood No. 2*, two each. All are non-resident aliens. The crew of the *Parris Island* sign Honduran articles while the crews of the remaining vessels sign Liberian articles.

The *Linden* makes approximately 7 trips per month to Jacksonville, Florida, each trip requiring it to be docked there for about 8 hours. Consequently, each barge averages 3½ trips per month with docking time identical to that of the *Linden*. All fuel for the tugs,

the cost of which per tug exceeds $10,000 annually, is obtained in the United States. All provisions for the tugs are obtained in the United States. The cost of provisioning each vessel is approximately $12,000 annually. Each of the vessels in question is dry-docked annually at Jacksonville, Florida. The cost of dry docking each tug is $18,000 per year. The combined operations of the 4 vessels result in the transportation to the United States of approximately 3 million dollars worth of pulpwood each year.

Thus, with respect to the *Linden, Pulpwood No. 1,* and *Pulpwood No. 2* we have before us vessels owned and operated from the United States by a domestic United States shipowner and which ply regularly between a foreign nation and a State of the United States. Consequently, such maritime operations possess those substantial United States contacts which bring them, despite their foreign aspects, within the jurisdictional coverage of the Act.[1]

As for the *Parris Island,* it does not, like the other vessels, have in its usual operations physical contacts with United States ports or territorial waters. This fact, it is argued, precludes, in view of the foreign registry, application of the Act to the vessel. As the facts set forth above clearly show, the trips which the *Parris Island* made are either the initial or final stages in through voyages between Snake Cay in the Bahamas and Jacksonville, Florida. The tug makes no trips to, and has no commercial contacts with, Honduras, its flag state; neither does it take the barges from port to port in the Bahamas for purposes of loading them. Rather, when it picks them up at Snake Cay they are set for their international voyage: and the *Parris Island* becomes a part of that voyage

[1] See, *West India Fruit & Steamship Company,* 130 NLRB 343; *Hamilton Bros., Inc.,* 133 NLRB No. 85.

which runs between a foreign nation and a State of the United States. Similarly, on the return of the barges to Snake Cay, the tug operates only as the concluding link in a through international voyage. To consider the mechanical act of changing tugs at Matanilla Shoals as a decisive factor in determining the nature of the commerce involved here would be to sacrifice substance to form. The essential nature of the voyage is thus fixed when the tugs leave either Snake Cay or Jacksonville and the voyages are clearly trade or transportation between a foreign nation and a State of the United States.[2] Consequently, as the *Parris Island* operates as an integral part of such trade and transportation and in view of its domestic ownership and operation, we find that the *Parris Island* and its operations possess those substantial *United States contacts which place them under the* jurisdictional coverage of the Act.

In view of the foregoing, we find that the maritime operations, subject of the petition, are in and affect commerce within the meaning of Section 2 (6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2 (6) and (7) of the Act.

4. The *Appropriate Unit.* The Petitioner seeks a single unit, more fully described below, of crew members aboard all of the four vessels in question. The Employer, without contesting the unit composition, contends that four separate units are alone appropriate, each limited to the crew members of a single

[2] See, *Grace Lines, Inc.*, 135 NLRB No. 70.

vessel. The unit sought by the Petitioner covers insofar as the record indicates all unlicensed personnel employed in the Employer's shipping operations. Being employer-wide in scope, it is presumptively appropriate.[3] Furthermore, though the facts relied upon by the Employer are some evidence that single vessel units might be appropriate, they do not show that the requested employer-wide unit is inappropriate. Accordingly, we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All crew members of the tugs *Linden* and *Parris Island* and of the barges *Pulpwood No. 1* and *Pulpwood No. 2*, excluding guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United

[3] *Miratile Manufacturing Company, Inc.*, 124 NLRB 48, 49-50; *Western Electric Company, Incorporated*, 98 NLRB 1018, 1032.

States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes, by United Marine Division, NMU, AFL–CIO, Local 333.

Dated, Washington, D.C.

[SEAL] FRANK W. MCCULLOCH,
Chairman,

BOYD LEEDOM,
Member,

GERALD A. BROWN,
Member,
National Labor Relations Board.

PHILIP RAY RODGERS, *member*, dissenting:

The Petitioner seeks an election among a unit of employees employed aboard two tugs and two barges. One of the tugs and both barges are registered under Liberian law. The remaining tug bears Honduran registry. The tow tugs carry an unlicensed crew of 23, and each of the two barges has a two-man crew. None of these persons is either a resident or citizen of the United States. The articles which these crewmembers sign are either Liberian or Honduran and each contract of employment recites that the governing law and regulations is to be that of either Liberia or Honduras, as the case may be.

Contrary to my colleagues, and for the reasons stated by the United States District Court for the District of Columbia in *Sociedad de Marineros,*

(*United Fruit Company*), — F. 2d — (D.C. Cir. 1962), 49 LRRM 2434, 2441, the United States Court of Appeals for the Second Circuit in *Empresa Hondurena de Vapores* (*United Fruit Company*), — F. 2d — (2d Cir. 1962), 49 LRRM 2442, and my dissenting opinions in *West India*, 130 NLRB No. 46 and *Hamilton Bros. Inc.*, 133 NLRB No. 85, I would dismiss the instant petition.

Dated, Washington, D.C.

PHILIP RAY RODGERS,
Member,
National Labor Relations Board.

DALZELL TOWING COMPANY, INC., AND COMPANIA DE NAVEGACION SUFFOLK, S.A., EMPLOYER

AND

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, PETITIONER

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Carl B. Davidson, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Petitioner seeks a unit of all unlicensed seamen aboard the tanker, *Estrellita*, a Panamanian flag vessel. The companies contend that in view of the vessel's flag and the other foreign factors here present, the vessel and its operations do not come within the jurisdiction of the Act.

Compania De Navegacion Suffolk, S. A. (here called Suffolk), a Panamanian corporation, is the owner and operator of the *Estrellita*,[1] a Panamanian

[1] Dalzell Towing Company, Inc., named in the petition as the Employer together with Suffolk is the agent for the *Estrellita* while in the port of New York. Dalzell receives invoices for fuel, provisions, and other items for the vessel which it pays with sums advanced by Suffolk. In addition, it serves as the local cable and letter address for the *Estrellita*. However, as Dalzell is not otherwise responsible for the operation of the vessel, does not hire its crew, pay their wages, or otherwise affect their employment, we find it is not the employer of the employees sought herein.

flag vessel, and the only vessel involved in this proceeding. Suffolk's sole business is that relating to the *Estrellita* which it charters on the world market. In fact, Suffolk was apparently organized as a wholly owned subsidiary by Oil Transfer Corporation for the express purpose of owning and operating the *Estrellita* under the Panamanian flag in world trade. As for Oil Transfer, which formerly owned the Estrellita, it is a Delaware corporation engaged in the operation of American flag vessels carrying bulk liquids in U. S. coastal trade. All stockholders of Oil Transfer are American citizens, and all officers of that corporation hold corresponding positions with Suffolk. Additionally, three of Suffolk's five directors are directors of Oil Transfer. All the officers and directors of both corporations are U. S. citizens.

Though Suffolk's "principal place of business is in Panama, its office there appears to be little more than the minimum required to take advantage of incorporation under the laws of that country. Its business is actually carried out from its New York offices shared with Oil Transfer, where general executive policy and decisions relating to the *Estrellita* are made by the company's officers. As noted, Suffolk charters the *Estrellita*, apparently under time charter arrangements. Suffolk is responsible at all times for hiring the officers and crew of the vessel, for provisioning and repairing it, and for carrying out other operational details. When owned directly by Oil Transfer the *Estrellita* was engaged as an American flag vessel in U.S. Coastal traffic carrying oil. However, this vessel in 1957 was transferred to Suffolk and was apparently placed under the Panamanian flag at this time. Since then, the *Estrellita's* operations have been wholly separate from the coastal trade of Oil Transfer. Thus, she has been offered for

charter on the world market for the conveyance of oil, water, molasses and chemicals and has been chartered by both domestic and foreign corporations. As a result of this type of operation the *Estrellita* has spent, since her transfer to Suffolk, only some 26 percent of her total operation time in voyages on which she entered U.S. ports. During the first two years of such operations, the *Estrellita* remained almost exclusively in service in Sumatra working under charter to a Dutch Oil Company. More recently, during the year immediately preceding the filing of the petition she was chartered primarily to American shippers and, in consequence, a large majority of her voyages touched United States ports.

It is evident from the foregoing, and we find, that Suffolk, as the owner-operator of the *Estrellita* with full responsibility for manning the vessel and otherwise dealing with the crew, is the Employer of the employees in the requested unit. We find further that Suffolk is basically an instrumentality of Oil Transfer.[2] This is apparent from the facts (1) that its officers and three of its directors hold the same positions with its parent, (2) that it shares common offices with its parent, and (3) that it was organized for the particular purpose of operating one of its parent's ships in international trade. And, because of the above, and the fact that Suffolk operates its business for the most part from the United States we find also that Suffolk is, despite its Panamanian incorporation,[3] essentially a domestic U.S. enterprise. In sum, we have here an American employer engaged in operating a vessel, in commercial activities involv-

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[2] See *Peninsular & Occidental Steamship Co.*, 120 NLRB 1097.

[3] See *Chemical Carrier* v. *R. Smith & Co., International*, 154 F. Supp. 886.

ing voyages touching U.S. ports some 26 percent of the time over a three-year period, or about 50 percent during the year preceding the filing of the petition.

In determining in other cases whether substantial contacts exist which bring a foreign flag vessel within the jurisdictional coverage of the Act,[4] the Board has noted the importance of the U.S. nationality of a ship-owning employer and of voyages to and from U.S. ports. However, the Board has also emphasized that the application of the substantial contact test for determining maritime jurisdiction is not simply a mechanical operation of finding the presence of some special contacts. "Rather the problem is one," the Board has stated, "of evaluating the many aspects of the operation and determining whether or not the shipping involved is essentially that of this nation and not that of a foreign nation * * *".[5] Consequently, we have looked to the national connections of the owner-operator of a ship as important insofar as these connections show the nationality of the commercial activities in which ship is involved.[6] The situation here is different, however, in that it is the business operations of the charterers, who may or may not be U.S. nationals, and not that of Suffolk, which determines in what commerce the *Estrellita* will sail. Indeed, under the type of charter operations here involved, the U.S. connections of the owner-operator, though showing some U.S. interest in the ship, do not

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[4] See *West India Fruit & Steamship Co.*, 130 NLRB 343; *Hamilton Bros.*, 133 NLRB No. 85, p. 3; and case cited fn. 2 above.

[5] *United Fruit Company*, 134 NLRB No. 25, p. 3.

[6] In *Eastern Shipping Corporation*, 132 NLRB No. 72, the Board found the Act to apply even though the owner-operator of the ship was a *bona fide* foreign corporation as the facts showed the ship was operated as a part of an essentially domestic U.S. enterprise.

in themselves demonstrate sufficiently substantial U.S. contacts to confer jurisdiction. Similarly, the physical contacts of the vessel to the United States do not evince substantial ties to the commerce of this nation. Thus, the physical contacts derive not from the connection which the ship and its operation have to the owner-operator's fixed U.S. enterprise,[7] but rather from the charter's business; and the charterer, to reiterate, is whoever happens to charter the vessel.[8] In addition, nothing in the record before us suggests that either Suffolk or economic conditions favor chartering of the vessel by domestic, U.S. enterprises.[9] While the chartering of the vessel, during the year prior to the filing of the petition, did lead the vessel into frequent contacts with U.S. ports, there is no indication that the pattern of the recent past will continue into the future. In our view, this fortuitous element underlying the physical contacts of the vessel with the United States diminishes the importance of such contacts in determining whether jurisdiction exists."

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[7] As the Board has pointed out, in its view the mere fact a ship visits U.S. ports sporadically or regularly does not alone determine whether or not the Act is applicable. The test is whether or not the shipping is that of this nation, rather than that of a foreign nation. See *United Fruit Company*, 135 NLRB No. 25; also, *Eastern Shipping Corp.*, 132 NLRB No. 72, p. 5, and *Hamilton Bros.*, 133 NLRB No. 85, p. 3.

[8] Thus, it should be noted that the situation here is sharply distinguished from those in *United Fruit*, *supra*, and *Peninsular & Occidental*, *supra*, where the foreign corporations chartered their vessels only to U.S. corporations to which they were related for the continuing use of such corporations as an adjunct of their U.S. located commerce. Consequently, the ships by the very nature of the business in which they were involved regularly traded with U.S. ports, and barring some wholly unforseen change would continue to do so.

[9] As the Board pointed out in *West India*, *supra*, the Supreme Court seems to have held that "something more than a chance

In view of the foregoing, we conclude that substantial American contacts under the Board's decision in *West India* are not present in this proceeding. As there are no overriding U.S. interests warranting a finding that the *Estrellita* comes within the jurisdiction of the Act, we defer to the law of the flag, which is itself a substantial contact,[10] and find that we are without jurisdiction to proceed. We shall, therefore, dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

Dated, Washington, D.C., May 29, 1962.

[SEAL] FRANK W. McCULLOCH,
Chairman,

BOYD LEEDOM,
Member,

JOHN H. FANNING,
Member,

GERALD A. BROWN,
Member,

National Labor Relations Board.

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of fortuitous connection to substantial American interests is required before it will find a Congressional intent to regulate the event." 130 NLRB No. 46, p. 25, fn. 74.

[10] See *Lauritzen* v. *Larsen*, 345 U.S. 571, 584.

PHILIP RAY RODGERS, *member*, concurring:

This is yet another one of those cases in which the Board has been asked to assert jurisdiction over vessels owned by American shipowners, but registered under the flags of foreign nations and operated almost entirely by foreign citizens.[11]

While I am not persuaded that the so-called jurisdictional factors here are essentially different from those in a number of cases where the Board has justified an assertion of jurisdiction, I concur in dismissing the instant petition—but for the reasons I asserted in my dissenting opinion in the other cases.[12]

Dated, Washington, D.C., May 29, 1962.

PHILIP RAY RODGERS,

Member,

National Labor Relations Board.

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[11] *West India Fruit and Steamship Company, Inc.*, 130 NLRB No. 46; *Peninsular & Occidental Steamship Company*, 132 NLRB No. 1; *Hamilton Bros., Inc.*, 133 NLRB No. 85; *Eastern Shipping Corp.*, 132 NLRB No. 72; *United Fruit Company*, 134 NLRB No. 25; *Owens-Illinois Glass Company*, 136 NLRB No. 32. See also *Grace Line, Inc.*, 135 NLRB No. 70.

[12] See *Sociedad de Marineros (United Fruit Company)* decided January 18, 1962, 49 LRRM 2434 (U.S. Dist. Ct. for the Dist. of Col.); *Empresa Hondurena de Vapores (United Fruit Company)*, 49 LRRM 2442, F. 2d (C.A. 2, 1962). *Owens-Illinois Glass Co.* v. *McCulloch, et al.* (United States District Court for the District of Columbia) April 13, 1962, enjoining representation election order in Board Case No. 12-RC-1293.

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Nos. 91 & 93

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

IVAN C. McLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

EMPRESA HONDURENA DE VAPORES, S.A.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

EMPRESA HONDURENA DE VAPORES, S.A.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR UNITED FRUIT COMPANY AS *AMICUS CURIAE*

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Petitioner,

v.

EMPRESA HONDURENA DE VAPORES, S.A.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,

v.

EMPRESA HONDURENA DE VAPORES, S.A.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR UNITED FRUIT COMPANY AS *AMICUS CURIAE*

Interest of United Fruit Company

United Fruit Company files this brief as *amicus curiae* pursuant to Rule 42 (2) of this Court, with the consent of all parties. It was a party to the proceedings before the

National Labor Relations Board (Case No. 2-RC-10379 [IR. 9]). United Fruit Company was named as the alleged employer in the petition filed by the National Maritime Union (NMU), the labor organization seeking to represent the unlicensed seamen on the 13 ships managed and operated by Empresa Hondurena de Vapores, S.A., a Honduran subsidiary of United Fruit (IR. 10).

The Board held United Fruit together with Empresa to be ". . . joint employers of the employees covered by the petition" (IR. 16). The Court of Appeals for the Second Circuit, in its unanimous decision, found ". . . the Board's statement that United Fruit is a 'joint employer' to be an erroneous legal conclusion which must be disregarded" (IR. 62, n. 3).

In view of its direct interest in these proceedings, United Fruit Company files this brief to urge that it is not, and never has been, the employer of these seamen under any valid legal theory. United Fruit Company also supports the position of the respondents that the Board does not have jurisdiction over a representation case involving Honduran citizens serving as seamen on Honduran flag ships owned and/or operated by a Honduran corporation, the stock of which is owned by United Fruit Company. However, it leaves the principal burden of such argument with the parties directly involved in this representation proceeding, its primary interest being that the Court of Appeals' determination, that United Fruit is not the joint employer of the Honduran seamen, be upheld.

Question Presented

The question which United Fruit Company considers to be presented for decision may be stated as follows:

> Whether the National Labor Relations Act gives the Board power to determine questions concerning the

union representation of Honduran citizens and residents who are hired in Honduras to serve on Honduran flag ships owned by a Honduran corporation, which is managed by its own officers and directors resident in Honduras, who fully control the Honduran corporation's labor relations, where the ownership of the stock of the Honduran corporation is in an American corporation which time charters those Honduran ships, for voyages to and from ports in the United States and Honduras, as well as world ports, on the theory that the American corporation is the joint employer of the Honduran citizens.

Statement

The relevant facts in Numbers 91 and 93 are set forth in the decision of the National Labor Relations Board (IR. 9-19) and in the complaint in the District Court for the Southern District of New York (IR. 1-8). The stenographic transcript of the representation proceedings are not a part of the printed record before this Court and no reference to that transcript will be made in this brief. In any event, there is no factual issue involved in this proceeding.

But the absence of a dispute on facts does not mean that the Statement in the Board's brief (pp. 3-8) gives a full exposition of the findings below. That statement confines to one paragraph (p. 6, 1st paragraph) the two most salient factual conclusions reached by both the Board and Court of Appeals; namely that:

(a) Empresa—and not United Fruit—is solely and completely responsible for the administration of its day-to-day affairs and exercises complete control over its labor relations policies; and

(b) Empresa and its employees have deep-rooted contacts of long duration with the Honduran sovereignty and

economy including residences, citizenship, home ports, Honduran trade, place of hire, collective bargaining and many others.

It is submitted that the Board expresses concern with general matters not here in issue such as the relatively recent growth of Panamanian and Liberian flag fleets. Such irrelevant references which inevitably color the facts present different factual issues not here on review. (See, e.g., Board's Brief, pp. 18-21; 27-33.) This proceeding deals with an enterprise which has been part of the Honduran economy for over twenty years; it does not involve ventures set up during "the past ten years" (p. 18), nor ships "transferred from American registry" (p. 19), nor vessels which "never visit the flag country" (p. 19). The facts set forth in the record reveal the fullness of the Honduran nationality of Empresa and its standing, separate from United Fruit, as the sole employer of the Honduran seamen.

1. The Parties to this Proceeding.

A. United Fruit Company.

United Fruit Company is a publicly owned New Jersey corporation with business interests extending throughout the world (IR. 12). Its principal business is the growing, transporting, and selling of agricultural products including bananas, sugar, and cacao (IR. 12). These commodities are transported and sold to various world markets including United States ports, on ships which are owned by United Fruit or chartered from many other companies, including Empresa (IR. 12).

B. Empresa Hondurena de Vapores, S.A.

Empresa Hondurena de Vapores, S.A. is a Honduran corporation, which was organized under the laws of the Republic of Honduras in 1941. It has its principal office

and place of business at Puerto Cortes, Honduras (IR. 1). Its "principal business is owning and/or operating 13 seagoing vessels which are registered under the laws of Honduras, fly the Honduran flag, are manned by unlicensed seamen employed in Honduras . . . under shipping articles executed in Honduras" (IR. 1). United Fruit owns all the stock of this Honduran corporation (IR. 13).

As shipowner and operator, Empresa provides ships that are fully equipped with crew and provisions and ready to put to sea (IR. 14). In describing the responsibilities of Empresa as an owner of vessels under time charter, the Board found:

> "Thus, it [Empresa] is responsible not only for the physical condition of the ships and for provisioning them, except for fuel, but also for hiring the officers and crews and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel. There is nothing in the record to suggest that Empresa does not in fact carry out these typical responsibilities of the owner of a vessel under a time charter." (IR. 14)

These 13 ships are time chartered to United Fruit Company and others, and visit ports in Central and South America, the United States, Canada and Europe (IR. 3, 13, n. 11). Each of these ships regularly call at Honduran ports for the purpose of taking on and discharging cargo, and to renew ship's articles (IR. 3, 15, 60).

Empresa's principal office is and always has been in Honduras (IR. 1). None of its officers (who are elected by the Directors) or Directors "is employed by or associated with United Fruit Company and since its formation in 1941 all of its officers and directors have resided in Honduras" (IR. 2, 13). Empresa operates as a completely separate corporate entity in Honduras, with its own real estate and its own corporate records (IR. 13).

C. The Honduran Citizens and Residents Sought to be Represented by the American Union.

About 334 Honduran citizens serve as unlicensed seamen aboard Empresa's 13 ships. Only one non-Honduran citizen, a Jamaican, is employed (IR. 4, 60). As the Board found:

> "The crews are hired in Honduras, are composed almost wholly of citizens of that country, and sign Honduran shipping articles." (IR. 14, n. 15)

In hiring these Honduran seamen in Honduras, it is required by Honduran law that the seamen furnish a Honduran passport, a Honduran seamen's identification book issued under the Honduran Merchant Marine Act, a certificate of Honduran military inscription, and certain medical certificates issued by Honduran health officials (IR. 4).

Since 1941, the unlicensed seamen have been represented for purposes of collective bargaining, by Sociedad Nacional de Marineros de Honduras ("Sociedad"), a Honduran labor organization recognized under Honduran law as the seamen's exclusive collective bargaining agent (IR. 4), to which all of Empresa's seamen belong pursuant to paragraph 10 of the current collective bargaining agreement (IR. 27).[1]

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[1] Sociedad did not participate in the proceedings before the Board. Another and different union, known as Sindicata Maritimo Nacional de Honduras ("Sindicato"), claiming to be a labor organization admitting Honduran seamen to membership, also did not participate. The statement in Board's brief that Sindicato participated (Bd. Br. p. 4) is inaccurate and contradicted by note 22 of the Board's decision (IR. 17). After the close of the hearing, without notice, hearing, or an opportunity to examine into Sindicato's interest or standing as a labor organization, Sindicato was permitted to intervene, over objection of petitioning union NMU and other parties.

D. The National Maritime Union.

National Maritime Union (NMU) is an American labor organization, representing American seamen on American flag ships, which filed a petition with the Board seeking to represent the Honduran seamen on Empresa's ships (IR. 9-10). NMU is not qualified to represent Honduran employees under the Honduran Labor Code and Regulations (IR. 5, 61).

2. Empresa Solely and Directly Controls the Policies and Labor Relations of the Honduran Seamen

The basic relationship between the parent, United Fruit Company, and its various subsidiaries was found by the Board to be as follows (IR. 12-13):

> "The primary purpose of UFCO's operating through subsidiaries is to achieve, as its vice-president explained in his testimony, a decentralized control of the companies' many activities in which the subsidiaries, more or less specializing in particular types of undertakings, deal with the day-to-day problems of their operations while over-all policy and development control resides in the parent company."

Empresa, as has been noted above, operates its own business through its own officers and directors resident in Honduras (IR. 13). Empresa hires, fires, and determines the wage scale and conditions of employment of its employees. It also negotiates and executes collective bargaining agreements with representatives of its employees. It separately and independently performs each and every labor relations or personnel function concerning its own employees. There has been absolutely no finding that any

direction in this regard emanates from United Fruit. Rather the Board found that Empresa:

> "has the sole and exclusive authority and control over all matters concerning terms and conditions of employment including hiring, firing, wages and discipline of employees" (IR. 4).

Not a single one of the officers and none of the directors of Empresa is an employee of, or associated with, United Fruit (IR. 2). As the Board found, there are ". . . no interlocking directors with, or officers common to, Empresa and its parent" (IR. 13).

In Empresa's own offices in Puerto Cortes, Honduras, it interviews and hires all of the seamen who are referred to it by a Honduran union (IR. 1). After hire, these seamen sign articles of employment with Empresa in Honduras (IR. 4). Empresa maintains all of its own business records (IR. 13).

The Board found that Empresa, not United Fruit, is responsible solely ". . . for hiring the officers and crews and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel." (IR 14). For more than 20 years Empresa has recognized and bargained with Sociedad Nacional de Marineros de Honduras, a labor organization, recognized as a juridic person by the Republic of Honduras (IR. 4, 22). It has a current collective bargaining agreement with that union which does not expire until February of 1963 (IR. 60).

The current collective bargaining agreement, a copy of which is set forth at length in the record (IR. 22-35) covers all of the terms and conditions of employment including:

(a) Recognition (IR. 23)

(b) the union shop (IR. 23, 27)

(c) special allowances for meals (IR. 24)

(d) repatriation (IR. 25)

(e) maritime labor accidents (IR. 25)

(f) compensation for accidents (IR. 25-26)

(g) no strikes or lockouts (IR. 27)

(h) wages for each unlicensed classification (IR. 28)

(i) vacations (IR. 29)

(j) maintenance and cure (IR. 30)

(k) hours of work (IR. 31-32)

(l) holidays (IR. 32)

(m) overtime (IR. 33) and

(n) term of contract (IR. 34)

This collective bargaining agreement was signed by the president of Empresa, residing in the Honduran city of San Pedro Sula and the union president residing in Puerto Cortes (IR. 22).

The recognition given by Empresa to Sociedad is compelled by Honduran law, under the terms of which Empresa "is required to recognize the Union as the exclusive bargaining agent of its unlicensed seamen" (IR. 5). This obligation entails the making and administering of collective bargaining agreements (IR. 22).

Labor grievances are handled by representatives of Empresa and the union, and if not settled are referred to a public solicitor from the Ministry of Labor in Honduras, the labor courts in Honduras and the Minister of Labor of Honduras (IR. 5). Empresa and its seamen are within the jurisdiction of the Labor Court of the Department of Cortes and "[a]ny controversies which arise between these parties are subject in accordance with the provisions of th Constitution and the law, to said Labor Court" (IR. 40, 41).

3. Empresa's Honduran Seamen and Honduran Flag Ships Are Subject to the Labor Code of Honduras, the Merchant Marine Law of Honduras, and to all of the Regulatory Laws of that Country.

The approximately 330 Honduran citizens and residents who work on Empresa's ships are covered by the labor and social laws of Honduras and receive the benefits therein provided (IR. 4, 5).

Each seaman must possess Honduran documents and Honduran health certificates. After he has been hired in Honduras pursuant to the detailed requirements of Honduran law (IR. 4), he is required to sign ship's articles maintained under Article 24 of the Honduran Merchant Marine Act. These articles are certified by the Commander of the port in Honduras (IR. 4). Officer personnel must be licensed by the Honduran government (IR. 3).

Empresa has never owned or operated any American flag ships (IR. 3). The 13-ships in the Empresa fleet are registered with the Republic of Honduras in compliance with the requirements of the Honduran Merchant Marine Act of 1943 (IR. 3). Each vessel must carry on board as evidence of its registration a "Patente Definitiva de Navegacion" issued by the Commander of its home port, either Puerto Cortes or Tela in Honduras (IR. 3). Such Patente is issued only after Empresa files an application with the Republic of Honduras at the capital, Tegucigalpa, and complies with other requirements of the Merchant Marine Law.

Each vessel must carry a safety equipment certificate and navigation license issued by the Republic of Honduras, together with certain other papers, documents and certificates required by the Honduran law. Empresa's ships carry radios licensed by Honduras and bearing call letters issued by that Republic (IR. 3).

Empresa's ships regularly visit their home ports in Honduras, carry tonnage to and from Honduras, and purchase ship's provisions from that country (IR. 60). Empresa's contacts with Honduras have always been complete and continuous.

4. Empresa May Deal Only With Honduran Unions Under Honduran Law.

Empresa is prohibited from recognizing the National Martime Union by specific provisions of Honduran law which require that no union may function as the collective bargaining representative of Honduras unless "it is composed of at least ninety percent (90%) of Honduran citizens", and unless "recognition of its juridic personality" has been issued by the Minister of Labor of Honduras (Honduran Labor Code, Articles 504 and 490; IR. 5). Pursuant to the provisions of the Honduran Labor Code the Honduran Ministry of Labor has issued a ruling that:

> "The resolution handed down by the National Labor Relations Board of the United States referred to in the petition of the Empresa Hondurena de Vapores, is in conflict with the Constitutional, Labor and Procedural Law of Honduras, which are all a matter of Public Law." (IR. 41)

After declaring, in effect, that the Board's action in assuming jurisdiction over Empresa and its seamen was a direct incursion on the sovereignty of Honduras, the Minister ruled that under Honduran law the Board "cannot intervene in a labor matter which (as here) involves a Honduran shipping company and the seamen who work on its ships which fly the Honduran flag" (IR. 41). It was further determined:

> "That no foreign union can represent the interests of seamen who work on ships sailing under the Honduran flag:" (IR. 42)

The Honduran Labor Minister concluded by stating that any attempt by the Board to assert such jurisdiction over, or to intrude on the employer-employee relationship between, Empresa and its seamen would be held "null and void in accordance with the Honduran Constitutional, Labor and Procedural Law (IR. 42).

5. The United Fruit Company Exercises No Control or Direction Over the Unlicensed Seamen of Empresa.

There is no dispute that United Fruit exercises absolutely no control whatsoever over the direction of Empresa's work force or Empresa's labor relations policies. The Board has specifically recognized that Empresa is solely responsible for the total employer-employee relationship including collective bargaining and discipline of personnel (IR. 14).

United Fruit Company's only relationship with the employees of Empresa is as a time charterer of the ships (IR. 4, 14, 15). Empresa exercises all of the functions of a shipowner as would normally be exercised by any shipowner who time charters his ships to another. Whether United Fruit Company time charters its ships from Empresa or from any Swedish, English, Greek or Liberian shipowner, having no relation with United Fruit Company, the result would be the same. For as the Board has specifically found "There is nothing in the record to suggest that Empresa does not in fact carry out these typical responsibilities of the owner of a vessel under a time charter." (IR. 14). The owners of time chartered ships retain full control of their ships and all aspects of their management, both internal and otherwise, and including labor relations.

Simply stated, the time chartering of a ship is the leasing of a fully manned and provisioned ship which is ready to put to sea. The owner has manned his ship with a Master of his own selection, and with his own officers

and his own seamen. The owner is the only one having the right to hire or fire or in any other way discipline or control the seamen aboard these ships (IR. 14, 15). The charterer normally does not even have a representative aboard the ship which is controlled solely by the shipowner's licensed officers. Certainly, time charter of Empresa's ships to United Fruit, on the above basis, does not integrate the two separate operations of owner and charterer or convert an otherwise foreign shipping venture into an American one.

* * * *

In all of the above facts, only two points of contact with the United States emerge: (a) United Fruit Company's ownership of the stock of the Honduran corporation; (b) the regular entry of Empresa's ships chartered to United Fruit Company into American ports. In effect, the Board found that these two factors were sufficient both to constitute United Fruit as an employer of the Honduran seamen and to constitute the Empresa enterprise as an American one for jurisdictional purposes.

The Circuit Court of Appeals unanimously disagreed. It not only found that the Honduran contacts far outweighed the American points of contact (IR. 77) but also rejected the Board's conclusion that United Fruit, together with Empresa, was a joint employer of the seamen (IR. 62, n. 3). That determination should be affirmed.

Summary of Argument

I. The Court of Appeals properly rejected the Board's legal conclusion that United Fruit, together with Empresa, was a joint employer of the Honduran seamen on the Honduran flag ships in view of the Board's clear findings that Empresa was completely and solely in charge of the operations of its ships and its labor relations with the crew (IR. 62). The Board's conclusion clashes with

established principles of law which require that a determination holding a parent as the joint employer of its subsidiary's employees must be based either on findings of common management or common control of labor policies. Neither of these findings have been made by the Board here. In fact, the opposite conclusions have been reached: that Empresa, solely, and to the exclusion of United Fruit, controls its own business and its own labor relations.

Not a single one of the many factors, which in combination, have been held sufficient by the Courts and the Board to establish the joint employer relationship has been found to exist here. There are no interlocking or common officers or directors; the parent does not participate in its subsidiary's labor negotiations; there is no consultation between parent and subsidiary on labor relations matters; United Fruit does not lay down any basic labor policies for Empresa to follow; there is no similarity of wages, salaries, and working conditions of parent and subsidiary; there are no common employees, no keeping of the subsidiary's books and records by the parent, no common labor relations personnel, no common representation by the same attorney, no common executive offices; nor any of the other accepted indicia of integration used by the Courts and Board in the past.

Nor, as the Board has recognized in other decisions, is the fact that a subsidiary carries in its ships the goods of its parent a conclusive or decisive factor of integration. In the transportation industry, parent and subsidiary have been considered separate employers where one carried or transported goods, cargo, or freight for the other, so long as each maintained its own day-to-day management policies and administered its own labor relations with its respective employees, independently of the other.

The Honduran seamen here receive neither directions nor instructions from any persons employed by United

Fruit Company. They are hired by Empresa personnel in Honduras and serve under Empresa's supervisors wherever they may be from that time forward, whether it be in Empresa's office building in Puerto Cortes, an Empresa ship flying the ensign of Honduras on the high seas, or in ports in Europe, Central or South America, Canada, or the United States. To make such a person the employee of a parent with whom the employee has no concern is to foist a new relationship on the employee of Empresa in such circumstances which is unwarranted by the express factual findings of the Board and of the Court of Appeals. Empresa alone has exercised authority over the employees in question. United Fruit has never had anything to do with them and cannot be held in any sense to be the employer.

II. (a) The National Labor Relations Act was never intended to be applied outside the United States or to affect the relationship existing between foreign seamen serving on ships of their native land which are owned by a native corporation, even though ownership of the stock of the corporation is vested in American interests.

While arguing that the National Labor Relations Act does apply, the Board nevertheless agrees that the Act must be interpreted in such a way as to prevent collision with the laws of a foreign state. Such collision necessarily comes about when an American statute is applied to sever a twenty year relationship of these Honduran employees not only with their own Honduran union, but also with their Honduran labor tribunals and Honduran laws which have guided for so long the employer-employee relationship.

(b) The treaty with Honduras, as the Board recognizes (Bd. Br. p. 45), leaves to the Honduran sovereignty the complete power over all matters pertaining to the internal order of Honduras flag ships. The organization, representation and collective bargaining rights of Honduran seamen are clearly matters relating to the "internal

order" of the ship because they affect rates of pay, hours of work and other conditions of employment.

(c) The State Department and Defense Department of the United States affirm that Board assertion of jurisdiction here would unsettle international relations and subvert national defense policies. The Board has not been given jurisdiction in either of these two fields. It should be required to forbear from interference in these sensitive areas.

(d) In determining who is to regulate a permanent labor relationship, the rule of the law of the flag should govern. Where the nationality of the crewmen and the flag of the ship are non-American, that rule should be treated as conclusive without the need for evaluating points of contact.

Obviously, questions concerning the organization and representation of seamen, of discriminatory discharge, refusal to bargain, rights and duties of unions and employees, are matters dealing with permanent relationships of relatively long duration. Unlike transient tort actions which normally involve a single litigation before an American tribunal, employee relations provide continual opportunity for collision between American and foreign law. In cases involving such a permanent labor relationship the intrusion of American law to the exclusion of the law of the flag country should not be countenanced.

POINT I

The United Fruit Company is not the employer of the Honduran seamen. The Court of Appeals properly rejected the Board's contrary conclusion on the basis of the Board's own factual finding that Empresa carries out all of the responsibilities of a ship owner under a time charter and exercises full control over the labor relations of its personnel.

United Fruit Company has absolutely no responsibilities or rights, as employer, over the Honduran seamen. These seamen are hired by Empresa; directed by Empresa; assigned by Empresa; suspended by Empresa; laid off by Empresa; recalled by Empresa; promoted by Empresa; and disciplined by Empresa, which responsibly directs them and adjusts their grievances (IR. 14, 62) see [e.g., statutory definition of "supervisors" in § 2 (11) of the Act, 29 U.S.C. § 152 (11)].

Not one of these elements of supervisory authority is vested in any United Fruit personnel. "United Fruit Company has no employer relationship whatever with any employee of plaintiff [Empresa] including seamen employees" (IR. 4).

The Board strives to correlate the direction (as to destination, length of port stay, and type of cargo to be loaded), which the Master of each Empresa time-chartered ship receives from United Fruit Company officials, with integration of Empresa's operations with those of United Fruit. Thus, the Board's finding of integration is based on the fact that United Fruit "as the time charterer of the vessels" determines where and when the vessels will sail, that "[i]n exercising its control, UFCO deals directly" with the ship's captain (IR. 14), and that the ships are "under the jurisdiction of UFCO's Marine Division" (IR. 15).

But the above conclusory language describes the normal and habitual practice of a charterer under a time charter. This is not evidence of that type of integration which would make United Fruit the employer of Empresa's seamen. United Fruit's function with respect to where the ship is to go, and the so-called jurisdiction of the Marine Division means nothing more than that United Fruit Company, just like any other time charterer, carries out the "typical responsibilities" of a time charterer, directing Empresa as to how and where the ship is to be used. And in the Board's words, Empresa carries out the "typical responsibilities of the owner of a vessel under a time charter" (IR. 62). This includes the independent maintenance of all relations with the crew.

In exercising United Fruit Company's rights as time charterer, the Marine Division issues the normal charterer's instructions. The very same statement can be applied with equal force to all other ships which are also chartered by United Fruit from time to time, where there is no stock ownership affiliation between UFCO and the vessel owner (IR. 16, n.18). These ships, too, are under the jurisdiction of the Marine Division. As time charterer, United Fruit has a right to determine which ships shall be used in a particular run to carry particular cargo. Exercise of this right is obviously far from the type of "control" which would create United Fruit Company the employer of the seamen on such other chartered ships.

The petition filed by the NMU with the Board named only United Fruit as employer. Empresa voluntarily intervened (IR. 10, n. 2). It is submitted that the Board recognized that it could not hold United Fruit singly as the employer of the Honduran seamen and that the only way it could impose its jurisdiction would be to invent some theory permitting it to treat United Fruit and Empresa as the joint employer of the seamen here involved. Yet the record reveals that not one of the elements making up the

employer-employee relationship exist as between United Fruit and the Honduran seamen. The proof is all the other way. Empresa controls its own business and exclusively and independently directs the labor relationship between it and its crews.

A. United Fruit cannot be considered the employer since none of the factors which constitute a parent the employer of its subsidiary's employees exist here.

Ownership of the stock of a subsidiary does not make the parent corporation the employer of the subsidiary's employees, absent a showing of control by the parent of either the day-to-day business of the subsidiary or its labor relations. The Court of Appeals for the District of Columbia has said in *Press Co.* v. *NLRB*, 118 F. 2d 937, 945 (D. C. Cir. 1940) *cert. den.*, 313 U. S. 595 (1941), where both companies had common officers and directors:

> "Of course, it is true that [parent company], as the owner of all the voting stock of [subsidiary], was in position to dictate its action in any corporate matter, *but until legislation is adopted outlawing holding companies, this alone, in circumstances like these, is not sufficient to annul corporate identity . . .*" (Emphasis supplied)

More reason for application of this principle exists here where United Fruit and Empresa are each governed by different Boards of Directors and led by their own officers. Courts and Board cases which have considered the issue of joint employer have developed many factors found to be necessary to the establishment of that relationship. Among these cases is every one of the eight decisions cited by the Board on page 57 of its brief—cases labeled by the Board as "settled authority" which "clearly justify a finding that Empresa and UFCO constitute an integrated operation or a single or joint employer for purposes of the Act". The

Board—cited cases are briefly discussed in the margin.[2] Analysis of these cases shows that, in every case, the joint employer relationship was based on solid findings of either (1) parental control or common management of the subsidiary's day-to-day business or (2) direct parental participation or intervention in the subsidiary's labor affairs and collective bargaining relationships. No finding of such parental activity was, or could be made, in the case at bar.

Evidence of parental control of business operations or of participation in labor relations manifests itself in a number of different fact situations. The Courts and the Board have required that the following factors, not found in the instant case, be present in order to justify holding the parent as the employer of its subsidiary's employees.

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[2] In *A.M. Andrews Co. of Oregon* v. *N.L.R.B.*, 236 F. 2d 44 (9th Cir. 1956), both corporations had same president, treasurer and secretary. The joint president determined labor policies for the subsidiary.

N.L.R.B. v. *Jones Sausage Co.*, 257 F. 2d 878 (4th Cir. 1958), involved common ownership, common corporate officers, centralized management administration and control of labor policies.

N.L.R.B. v. *Calcasieu*, 203 F. 2d 12 (5th Cir. 1953), dealt with a corporation and partnership wherein the president and chairman of the board of corporation was also general manager of partnership. In addition, there was some centralized administration and control of labor policies.

In *N.L.R.B.* v. *Somerset Classics, Inc.*, 193 F. 2d 613 (2nd Cir. 1952), there was common ownership, common corporate offices and common management.

N.L.R.B. v. *A. F. Nettleton Co.*, 241 F. 2d 130, 131 (2nd Cir. 1957), had five corporations, each with the same principal officers and the same president who "has the final decision on matters involved in collective bargaining."

N.L.R.B. v. *Price Valley Lumber Co.*, 216 F. 2d 212 (9th Cir. 1954), concerned two commonly owned partnerships which operated together on the same premises and which, for payroll and maintenance of records purposes, were centrally administered.

N.L.R.B. v. *National Shoes, Inc.*, 208 F. 2d 688 (2nd Cir. 1953), dealt with two corporations having the same president, sec-

(Footnote continued on following page)

1. *No interlocking or common officers or directors.*

Management of subsidiary and parent by common officers and directors is often pointed to as an important element of control. Common officers and directors were involved in all eight of the cases cited by the Board on page 57, namely, the *Andrews*; *Jones, Concrete Haulers,*

(Footnote continued from preceding page)

retary and treasurer, the same boards of directors, same counsel who conducted their labor negotiations, and the same group of officers determining the labor policies.

N.L.R.B. v. *Concrete Haulers*, 212 F. 2d 477, 479 (5th Cir. 1954) involved a situation in which the two employers had the same President, Vice President, and Secretary Treasurer and, as the Court found "the interdependence and integrated nature of the operations of the respondents, the common ownership of stock, and the fact that the same officer administers a common labor policy, clearly indicate that there is only one employer for the purposes of this Act."

Three other cases also cited on page 57 of the Board's brief are also not applicable.

Local No. 24, International Brotherhood of Teamsters v. *N.L.R.B.*, 266 F. 2d 675 (D. C. Cir. 1959), held that a corporation which leased motorized equipment from other companies was so allied in interest with the lessors as to make action against the latter primary rather than secondary. It was found that the corporation employer "directs the conduct of the lessors' drivers as it would its own drivers" . . . reviews the acceptability of drivers to be hired and recommends "penalties, including discharge" (p. 680).

In *N.L.R.B.* v. *Deena Artware, Inc.*, 361 U. S. 398 (1960), this Court held that the Board was entitled to take depositions and to engage in discovery and inspection to determine whether a group of affiliated corporations "are not what they appear to be, that in truth they are but divisions or departments of a 'single enterprise'" (p. 402), where the Board alleged that a single stockholder (who was president, treasurer and director of each corporation, the remaining officers and directors being his wife, son and secretary) was manipulating the affairs of several related corporations to avoid payment under a back pay order against one of the corporations.

The ruling in *Bowater Steamship Co.* v. *Patterson*, 303 F. 2d 369, 373 (2nd Cir. 1962), was merely that under the Norris-LaGuardia Act, a labor dispute may exist whether or not the parent and subsidiary were a single entity and "regardless of whether the disputants stand in the proximate relation of employer and employee". This case has no application to the issue here involved.

Calcasieu, Somerset, Nettleton, Price Valley, and *National Shoes* cases. Here, the Board has found that United Fruit Company and Empresa each has its own officers and directors, who have no association with the other company (IR. 13).

2. *No participation of parent in subsidiary's labor negotiations.*

Obviously, parent participation in the labor negotiations of the subsidiary is indicative of parental control sufficient to create the parent as a joint employer, with the subsidiary, of the latter's employees. *NLRB* v. *A. K. Allen Co.*, 252 F. 2d 37 (2nd Cir. 1958). Such participation was also found in the *Andrews, Jones, Concrete Haulers, Nettleton* and *National Shoes* cases. The finding of the Board here is that Empresa solely runs its own labor relations (IR. 14). It negotiates its own contracts with Sociedad. United Fruit does not participate therein.

3. *No basic labor relations policies with respect to wages, hours or working conditions laid down by parent.*

Evidence of control is found by the courts where a parent fixes the labor relations policies of a subsidiary. *William Randolph Hearst*, 2 NLRB 530 (1937); *enf.*, 102 F. 2d 658 (9th Cir. 1939); *NLRB* v. *A. K. Allen Co.* (*supra*). The record here shows neither the fixing of labor relations policy by the parent nor consultation between subsidiary with the parent on this issue. To the contrary, the finding of the Board is that such matters are determined by Empresa alone.

4. *No common employees of parent and subsidiary and no transferability between the employees of each.*

Integration of an operation is normally evidenced by the interchange of personnel between the two companies, the transfer of employees from one to the other and the use of

common employees to perform certain mutual functions. *NLRB* v. *Williams*, 195 F. 2d 669 (4th Cir. 1952), cert. denied, 344 U. S. 834 (1952); *American Furniture Co.*, 116 NLRB 1496 (1956). United Fruit Company and Empresa have no common employees. Not one common employee has been found among the hundreds of personnel of each company.

In addition many other elements of control have been applied by the Courts—not a single one of which exists in this case. For example: the same persons or attorneys do not handle labor relations for both parent and subsidiary. *Bachman Machinery Co.* v. *NLRB*, 266 F. 2d 599 (8th Cir. 1959); *Thompson Products Inc.*, 57 NLRB 925 (1944), *mod. and enf.* 162 F. 2d 287 (6th Cir. 1947). Nor are there common executive offices, common payrolls or common books and records. *NLRB* v. *A. K. Allen, supra; NLRB* v. *Price Valley Lumber Co.*, 216 F. 2d 212 (1954), *cert. denied* 348 U. S. 943 (1955). Nor is there distribution by parent of statements of policy to employees of subsidiary. *Condenser Corp. of America*, 22 NLRB 347 (1940), *enf.* 128 F. 2d 67 (3rd Cir. 1942).

Totally absent from this record are each of the above factors and any other moving or determinative elements applied by the courts in the allegedly "settled authority" cited by the Board on page 57 of its brief. What the Board refers to as "settled authority" in fact shows that integration compelling a finding of joint employer depends on facts not here present.

B. Since there is no centralized management or common control of labor relations, United Fruit cannot be deemed a joint employer.

As noted above, the Board and the Courts are in agreement that a finding of integration must be based on the two elements of common management and common control of labor relations policy. Otherwise, every extensive

public utility system, every nation-wide communications or transportation system would be considered as a single employer for the purposes of employee organization and collective bargaining without regard to the nature of the organization or its internal administration. The Bell System has operated for many years as a series of subsidiaries all owned and controlled ultimately by one holding company. Yet, before the Board, each of these companies stands on its own individual footing as a separate employer.[3]

The Board has shown commendable consistency—with the exception of this case—in holding that, absent actual control over the labor relations policies of its subsidiary, the parent is not to be looked upon as the employer. The Board's decisions in representations cases, in discrimination cases, in interference cases, and in unlawful support cases, have been uniform in so holding, with the approval of the Courts.

Typical of such holdings are *Public Service Corp. of New Jersey*, 72 NLRB 224 (1947); 77 NLRB 153 (1948), (holding company not employer of employees of subsidiary public utilities, despite finding of integration where parent did not exercise "any immediately effective control" over subsidiares); *Butte Water Company*, 117 NLRB 484 (1957) (subsidiary of Anaconda Company held to be sole

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[3] *Pacific Telephone & Telegraph Co.*, 85 NLRB 713 (1949); *Mountain States Telephone & Telegraph Co.*, No. 30-RC-276 (1950); *New York Telephone Co.*, 100 NLRB 1374 (1952); *Pacific Telephone & Telegraph Co.*, 80 NLRB 107 (1948); *Northwestern Bell Telephone Co.*, 79 NLRB 549 (1948); *Southern Bell Telephone & Telegraph Co. Inc.*, 78 NLRB 814 (1948); *Illinois Bell Telephone Co.*, 100 NLRB 101 (1952); *Southwestern Bell Telephone Co.*, 108 NLRB 1106 (1954); *New England Telephone & Telegraph Co.*, 90 NLRB 639 (1950); *Ohio Bell Telephone Co.*, 87 NLRB 1555 (1949); See, e.g. *Ozark Central Tel. Co.*, 83 NLRB 258 (1949), where parent Bell was held not the employer of the subsidiary's employees because "the record does not show that Bell controls the labor relations policies of Ozark" (at p. 259).

employer); *Spartan Cafeteria Corp.*, 109 NLRB 166 (1954) (subsidiary operating a cafeteria for parent's employees held a separate, and not a joint, employer).

In *American Furniture Co.*, 116 NLRB 1496, 1497 (1956), three furniture stores were engaged in the same business, had common ownership and interlocking directors and officers. The Board refused to treat the three corporations as a single employer. The basis for the Board's decision, applicable *a fortiori* here, was stated as follows:

> "The record further reflects that each employer is a separate legal entity; that each has its own stores, warehouse, offices, payroll division, financial organization, and each maintains and files separate tax returns. Each employer has a general manager who is in charge of, and who formulates the operational policies for, his store. There are no joint meetings of directors or officers of the three employers to discuss the business or policies. There is no interchange of employees; each employer does its own hiring and determines its own 'questions of policy.'
>
> From the foregoing, we conclude that each employer operates independently, and not as a part of a single integrated enterprise with centralized management and central control over labor relations policies."

The separateness of Empresa and United Fruit is even more clear.

C. United Fruit Company's chartering of Empresa's ships is not evidence of integration.

Wherever the Board in its decision and brief speaks of integration, it is referring to nothing more than the time charter relationship between Empresa and United Fruit. It lays great emphasis on the fact that the two companies are engaged in a venture to which both contribute to the

overall result. Obviously this engagement in a common enterprise is true of all time charter arrangements.

The use of Empresa ships in moving United Fruit Company's cargo—as well as the cargo of other private owners—is not a factor which supports a determination of integration. Similar fact situations have been considered many times by the Board without a finding of integration. See, e.g., *Liquid Transport Corp.*, 111 NLRB 376 (1955); *Clark Concrete Corp.*, 116 NLRB 321 (1956).

In *Liquid Transport Corp., supra*, two related corporations supplied tractors to haul trailers operated by a third related corporation. The Board refused to consider the two tractor corporations, or all three corporations, as one employer, saying: "Upon the above facts, we find that Troy and Pierson are not sufficiently integrated with each other or with Liquid to constitute a single employer" (p. 377).

Similarly, in *Clark Concrete Corp., supra*, the Board refused to treat three corporations as a single employer, although the same individuals were officers and directors of three corporations, each was engaged in the manufacture of concrete products, and one corporation sold its product to the other two corporations for resale to their customers. The basis for this ruling was the significant fact that each corporation supervised its own business with its own plant manager who hired and discharged his corporation's employees and controlled its own labor relations policies.

Just a few weeks ago, the Board once again reaffirmed its position that there must be central management and control of the labor relations in order to establish a "joint employer" relationship. In the case of *Printing Pressman's Union*, 138 NLRB No. 137, 51 LRRM 1169 (October 1, 1962), which dealt with a charge of secondary boycott, the Board held that "notwithstanding the fact of single ownership, and the existence of some common officers and directors of the two corporations", the parent

and its subsidiary were to be considered as separate entities and not joint employers. This determination was based on its finding that the two corporations were "operated in substance as separate and autonomous corporations" hundreds of miles away from one another, with different and independent labor policies. Here, the distance between Empresa's directors in Puerto Cortes and the Boston office of United Fruit, together with Empresa's complete autonomy in determining labor policies, requires a similar result *à fortiori*.

Thus, both before and since its decision in this case, the Board has looked for the basic factors of integrated management and centralized control of labor relations policies. Here, the Board has ignored its own well established principles and has erroneously held that United Fruit and Empresa constitute a "joint employer" notwithstanding the fact that there is no centralization of management or control of labor policies.

* * *

To hold United Fruit to be an employer of the Honduran seamen is to place on it a responsibility for participation in Empresa's labor relations which it has not voluntarily assumed. Under no legal theory so far devised can United Fruit Company reasonably be held to be the employer, either jointly or singly, of Honduran seamen, with whom it has no relationship other than as time charterer and stockholder of the shipowner. The unanimous ruling of the Court of Appeals that "[w]e consider the Board's statement that United Fruit is a 'joint employer' to be an erroneous legal conclusion, which must be disregarded" (IR. 62) is supported by the Board's own findings of independence of Empresa in operating its ships, hiring its crews and "handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel" (IR. 14). This unanimous ruling should be upheld.

POINT II

Application of the Act to Honduran citizens would conflict with

(A) The Congressional intent limiting the act to "working men of our own country and its possessions",

(B) The treaty with Honduras which gives that country exclusive jurisdiction over all matters involving the internal order of Empresa's ships including every aspect of the employment relationship,

(C) The foreign relations and defense policies of the United States,

(D) The law of nations which require American forbearance to avoid collision with the Honduran law.

United Fruit Company's direct interest in this proceeding ends with a determination that it is not an employer of the Honduran seamen. If for any reason this Court were to hold otherwise on this issue, United Fruit would argue that the Act nevertheless does not apply for the reasons briefly developed below.

A. The Act is Limited to Working Men of the United States and its Possessions.

The Board's application of an "effects" test to determine the extent of its jurisdiction (Bd. Br., pp. 14-22) mistakes what Congress could do with what Congress, in fact, did.

This Court has stated that Congress did not fashion the Act to "resolve labor disputes between nationals of other countries operating ships under foreign laws", and that the background and history of the Act shows it to be "concerned with industrial strife between American employers and employees." *Benz* v. *Compania Naviera*

Hidalgo, 353 U. S. 138, 143-144 (1957). This Court further declared that the legislative history of the Act inescapably describes the boundaries of the Act as including only the working men of our own country and its possessions, 353 U. S. at page 144. See also, *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U. S. 365, 369 (1960).

The lesson of *Benz* is that an "effects" test alone is not appropriate to a proper examination of the extraterritorial scope of the National Labor Relations Act. In that case, the involvement of three American unions in a dispute on a foreign ship berthed at an American pier in American waters affected interstate commerce to a point sufficiently substantial to justify the interposition of federal power ". . . if Congress had so chosen" (353 U. S. 142). But Congress must speak explicitly and directly before a Honduran labor relationship which affects both Honduran and American commerce, is to be made subject to the Act.

The Board's argument (Bd. Br., pp. 22-23) that its jurisdiction encompasses every question of representation affecting commerce, including all movements between any foreign country and any state, ignores the necessity for avoidance of collision between the American law and that of other friendly powers. As the Court of Appeals has said below (IR. 72) the words of the statute are not to be "thus stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage. *Lauritzen* v. *Larsen*, 345 U. S. 571, 577-579, 581-582 (1953)."

Nor does the fact that, in *Benz*, the ship was temporarily in an American port, while the ships here visit American ports with some regularity, extend the scope of the Act's coverage. For, as this Court said in *Lauritzen*, regularity of contract is usual in the shipping industry and:

> ". . . the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country." (345 U. S. at p. 581.)

Frequency of contact is thus not a proper test to apply to Board jurisdiction since almost all foreign line operations sail their ships to and from American harbors with clock-like regularity. Where Congress has desired to apply American law to foreign flag ships, it has found no difficulty in doing it with clarity.[4]

Congress has not, either by express declaration or by implication, shown any desire to impose its policies upon the relationship between foreign crews and foreign employers. To the contrary, Congress has limited its labor legislation not only to American workmen, but also to American workmen within the territorial limits of the United States. *Foley Bros. Inc.* v. *Filardo*, 336 U. S. 281 (1949); *New York Central R.R.* v. *Chisolm*, 268 U. S. 29 (1925); *Air Line Dispatchers Ass'n.* v. *National Mediation Board*, 189 F. 2d 685 (D. C. Cir. 1951) certiorari denied 342 U. S. 849; *Air Line Stewards & Stewardesses Ass'n.* v. *Northwest Airlines Inc.*, 162 F. Supp. 684 (D.

[4] La Follette Seamens Act of 1915, 38 Stat. 1164 (1915); Steamboat Inspection Act, Rev. Stat. §§ 4399, 4401, as amended, 46 U.S.C. §§ 361, *et seq.*; The Dangerous Cargo Act, Rev. Stat. § 4472 (1871), as amended, 46 U.S.C. §§ 170, *et seq.*; The Load Lines for American Vessels Act; 45 Stat. 1492-1494 (1929), as amended, 46 U.S.C. §§ 85, *et seq.*; The Passenger Act, 22 Stat. § 186 (1883), as amended, 46 U.S.C. §§ 151-163, and various other statutes such as Rev. Stat. § 4400 (1871), as amended, 46 U.S.C. § 362; 41 Stat. 998 (1920), as amended, 46 U.S.C. § 882; 53 Stat. 1049 (1939), as amended, 46 U.S.C. § 224a.

In making the statutes specifically applicable to foreign ships language such as the following is used:

> "This section shall apply as well to foreign vessels while in waters of the United States . . ." 46 U.S.C. § 599(e).
>
> * * * *
>
> "And all foreign private steam vessels carrying passengers from any port of the United States to any other place or country shall be subject to the provisions of Sections 170, 391, 392, 399, 400, 402, 481, 494, 495, 497 and 498 of this title, and shall be liable to visitation and inspection by the proper officer, in any of the ports of the United States, respecting any of the provisions of the sections aforesaid . . ." 46 U.S.C. § 362.

Minn. 1958, *aff'd* 267 F. 2d 170 (8th Cir. 1959) certiorari denied, 361 U. S. 901 (1959).

This Court has declared that in the delicate and sensitive area of international relations the involvement of American law is not to be assumed unless the Congressional intent to invade the area is clear and express. *Benz, supra*, at page 147. The canon of construction continuously applied in this field is that expressed in *The Charming Betsy*, 2 Cranch. 6 U. S. 64, 118 (1804) to the effect that:

> "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."

Here, Honduran law has held sole sway since 1941 when Empresa was first formed. To cast aside now, after 20 long years of non-application of the Act, the Honduran law which has substantially regulated the employee-employer relationship, is a harsh thrust in the sensitive field of international relations. If it is to be made, those having clear jurisdiction in this delicate field should make it. But Congress has not spoken and the executive branch has taken a position contrary to the Board.

B. Under the Treaty Honduras Has Exclusive Jurisdiction Over Internal Order.

Article VI of the Constitution makes the Treaty of Friendship, Commerce, and Consular Rights between the United States of America and the Republic of Honduras dated December 7, 1927, the supreme law of the land. Article X of the Treaty (45 Stat. 2625) concededly gives Honduran nationality to Empresa's ships (Bd. Br., p. 45). Such Honduran nationality makes the Honduran law the sole power over all occurrences and relationships on the ships while on the high seas. 1 LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW, § 146 (8th ed., 1955); *The S.S. Lotus*, 2 HUDSON WORLD COURT REPORTS 20 (1935) (Perm. Ct. Int. Just., 1927). Further, Article XXII of the Treaty (45

Stat. 2634) gives exclusive jurisdiction to Honduran officials over all matters aboard the ships dealing with labor relations between the shipowner and the crew even when in United States ports.' There it is provided that an Honduran consular officer "shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country," and that such an officer "shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit."[5]

Internal order involves all things which make up the relationship between the master and crew and include all the terms and conditions under which a seaman is to work. Nor is the term limited to the power of the Master "to punish mutiny and otherwise discipline his crew . . ." (Bd. Br., p. 40) as is urged by the Board. This Court long ago held that wages, living conditions, discipline of the crew, and other matters of employee relationships are questions of "internal order" which are governed by the law of the flag. *The Belgenland*, 114 U. S. 355, 367 (1885); see also, *Simpson* v. *Hamburg American Line*, 17 A.M.C. 1469 (D. Canal Zone 1939); *McQuade* v. *Compania de Vapores, San Antonio, S.A.*, 131 F. Supp. 365 (S.D.N.Y. 1955) This Court, in defining the application of *Benz* in *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U. S. 365, at page 369, stated:

> "The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the *in-*

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[5] The Board's argument (Bd. Br. p. 45) that the language of Article XXII gives concurrent jurisdiction in matters pertaining to wages and execution of contracts because of the failure to repeat the word "exclusive" before the second use of the word "jurisdiction", reads too much into the provision. If the Treaty intended to give concurrent jurisdiction elsewhere it would have so provided, and would have also identified the recipient of such jurisdiction. The use of the word "also" before the words "have jurisdiction" shows that the grant of jurisdiction in this sentence is at least as broad as that described in the part of the Treaty giving "exclusive jurisdiction."

> *ternal labor relations* of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the *Labor Management Relations Act had no such scope or coverage . . .*" (emphasis supplied)

Collective bargaining on wages and other working conditions and grievance administration affecting seamen directly affect the "internal labor relations" of the Honduran flag ships. This subject should be left where it has been for decades—exclusively within the jurisdiction of Honduras.

C. Assertion of Jurisdiction Would Impinge Directly Upon the Foreign Relations and Defense Policies of the United States.

The Board in its brief (pp. 46 through 57) argues that the taking of jurisdiction by the Board neither subverts defense policy nor unsettles international relations.

The brief answer to the arguments therein made must be that the Board has not been entrusted either by the Executive or by Congress with jurisdiction in these two areas.

For the purposes of this brief it is sufficient to point out that the matter is clearly one of judgment in delicate areas affecting the foreign relations, defense and security of the United States. It is the judgment of the Defense Department that the Board's action would in fact subvert defense policy; it is that of the State Department that the Board's action does in fact unsettle international relations (Brief for the United States, pp. 7-11).

In the absence of clear Congressional mandate, an administrative agency having no authority over defense policies or international relations should not be permitted to decide questions of this magnitude over which the President, his Cabinet and executive departments, are given full responsibility.

D. The Law of Nations Requires the Board to Defer to the Honduran Law Under the Facts of This Case.

Admittedly, ". . . Honduras does have laws which apparently would conflict with the Act" (Bd. Br. p. 53). General principles of maritime and international law therefore unquestionably require the Board to reach an accommodation with the law of Honduras ". . . so as to minimize the possibility of collision between two sovereignties, each applying its own laws to the transaction" (Id. at p. 53). It is to be assumed that in enacting the National Labor Relations Act, Congress did not intend . . . "to violate the obligations of this country to other nations" including Honduras. *McLeod* v. *U. S.*, 229 U. S. 416, 434 (913); *U. S.* v. *Palmer*, 3 Wheat. (16 U. S.) 610, 4 L. ed 471 (1818). The inexorable rule of international law gives the flag nation the right to impose its law on the internal economy of the ship without interference from any other source. *The Muscat Dhows Case*, 1905, The Hague Court Reports 96 (Scott ed. 1916).

In this case, the non-American nationality of both ships and seamen makes irrelevant any evaluation of points of contact such as was made both by the Court and the Board. Such evaluation has no reasonable basis where there is being considered the permanent employer-employee relationship of Honduran citizens and residents working on Honduran flag ships. The Board's assertion of jurisdiction would affect every aspect of the rights and duties of employer to employee, including hiring practices, grievances, collective bargaining, wages, and other conditions of employment. It would require Empresa to violate either American or Honduran law. "The conflict between the United States and Honduran law would be constant" (IR. 78). Evaluation of ever changing points of contact cannot resolve the constant conflicts which necessarily must arise in labor relations problems. That the relationship concerns the employment rights of Honduran citizens

and residents on Honduran flag ships is a factor of sufficient importance to negate all other considerations.

But even if the Court of Appeals were correct in applying points of contact test to this situation, it is abundantly clear that it was correct in holding that the minimal contacts Empresa and its Honduran seamen have with the United States "are substantially outweighed for the purpose here at issue by Honduras' interests" (1R. 77).

The seven points of contact established by *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953), were tailored to fit the transient tort action of the injured seamen which would involve the forum only during the course of a single litigation. The seven factors are: (1) place of the wrongful act; (2) law of the flag; (3) allegiance or domicile of the injured; (4) allegiance of the defendant shipowner; (5) place of contract; (6) inaccessibility of foreign forum; (7) the law of the forum.

Modification of these points of contract to make them applicable here reveals that, in any event, all contacts are with Honduras. If, rather than the place of wrongful act, we consider where the employment relationship is carried out, we find that Honduran soil and Honduran ships in Honduran territorial waters and on the high seas are places of employment far more constant than the American port where the Honduran seamen may land only by grace of the immigration authorities. The law of the flag which this Court has termed "the most venerable and universal rule of maritime law" which "overbears most other connecting events in determining applicable law" (345 U. S. at 584) has applied to these Empresa vessels since its inception. Allegiance and domicile of the seamen clearly and unquestionably is in Honduras.

Allegiance of the ship owner, place of contract, inaccessibility of foreign jurisdiction and law of the forum are all factors which require the forbearance of American law. The ship owner is Empresa, a Honduran corporation; its

seamen signed their employment contracts and are hired in Honduras; their grievances and complaints have been handled for decades by Honduran officials in Honduran ports which are accessible to them at the end of each voyage; Honduras is the forum which has exercised complete and constant jurisdiction over this relationship.

As noted above we believe that any discussion of contacts is not relevant since the basic determination should be based on the law of the flag. Application of the definite and certain standard of the law of the flag makes all such valuation academic, however. It also avoids uncertainty and the type of questionable weighing of foreign factors with American contacts that it alleges it engages in. However, an examination of the six decisions referred to at length in the Board's brief shows that it uses the contact's theory as an excuse for assuming jurisdiction.[6] Even if a point of contacts test were valid—and we submit it is not—then no one of the six cases relied on by the Board is apposite because each of these cases involves fact patterns which are totally different at the following illustrations show. None of Empresa's ships have ever flown the American flag or transferred from American registry as were the ships in *West India, P & O,* and *Dalzell.* Empresa's ships regularly visit Honduran waters and engage in the trade and commerce of Honduras, unlike the ships in *West India, P & O* and *Owens-Illinois.* Here, the seamen are not hired by an American corporation, nor does any American person, firm or corporation control in any way the hiring or labor relations policy, as was the case in *P & O, Hamilton,*

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[6] These cases are *West India Fruit & Steamship Co.* (West India), 130 NLRB 343; *Owens-Illinois Glass Co.* (*Owens-Illinois*), 136 NLRB No. 32; *Peninsular & Occidental Steamship Co.* (P & O), 132 NLRB 10; *Eastern Shipping Corp.* (Eastern), 132 NLRB 930; *Hamilton Bros.*, 133 NLRB No. 85; *Dalzell Towing Co.* (Dalzell), 137 NLRB No. 48. Only in the latter case did the Board not take jurisdiction on the grounds that the ship spent only about a quarter of her time in voyages on which it entered U. S. ports, a point of contact which *Lauritzen* considers to be unimportant.

West-India and *Owens-Illinois*. Empresa's crews are composed of citizens of the flag country almost exclusively, which was not the case in *P & O*, *West India* and *Eastern*. In addition, such factors as common officers and directors, and common control of operations and labor relations policies by parent and subsidiary, present in a number of the other cases, are absent here.

Empresa has never owned American Ships; it has never employed American seamen; it has always been a part of the Honduran economy, carrying Honduran products to foreign ports and foreign products to Honduras. The cardinal importance in this case of the law of the flag is bolstered by so many other substantial contacts of the crew, of the ships, and of the employer to Honduras, as to require American law to defer to Honduras on this question of union representation affecting the internal order of Honduran flag ships.

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit should be affirmed.

Dated: November 12, 1962.

Respectfully submitted,

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OCTOBER TERM, 1962.

No. 91

IVAN C. McLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

EMPRESA HONDURENA DE VAPORES, S.A.

No. 93

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

vs.

EMPRESA HONDURENA DE VAPORES, S.A.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Supreme Court of the United States

OCTOBER TERM, 1962.

No. 91

IVAN C. McLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

EMPRESA-HONDURENA DE VAPORES, S.A.

No. 93

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,

vs.

EMPRESA HONDURENA DE VAPORES, S.A.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR EMPRESA HONDURENA DE VAPORES, S.A.

Constitutional Provisions and Statutes Involved.

The constitutional provisions and statutes involved are set forth in Appendix A, pages 58 to 65.

Questions Presented.

1. Whether the Labor Management Relations Act, 1947 (LMRA) (29 U. S. C. §§141, *et seq.*) extends to the organizational and collective bargaining activities of unlicensed seamen:

(a) who are all Honduran citizens except one, a Jamaican citizen;

(b) who are employed in the Republic of Honduras, under shipping articles executed in Honduras, by a Honduran corporation whose stock is owned by an American corporation;

(c) who man seagoing vessels owned and/or operated by the Honduran corporation, which are engaged in regular sailings in foreign commerce between the United States and Honduras and other Latin American ports and which fly the flag of, and are registered in, the Republic of Honduras and are time chartered to the American corporation; and

(d) who are represented by a Honduran labor union which is their exclusive bargaining representative under Honduran law.

2. Whether the action of the National Labor Relations Board (Board) in directing the representation election among these unlicensed seamen violated certain provisions of the Constitution of the United States.

3. Whether the United States District Court for the Southern District of New York had the jurisdiction and power to enjoin the representation election ordered by the Board.

Statement of the Case.

On November 15, 1961, the Board filed a Decision and Direction of Election in which it directed that a representation election be held among the foreign unlicensed seamen employed aboard Honduran flag vessels which are owned or operated by Empresa Hondurena de Vapores, S. A. (Empresa), a Honduran corporation (R. 9-20; 134 NLRB No. 25).

On December 12, 1961, Empresa brought this action in the United States District Court for the Southern District of New York (R. 1-8) to enjoin petitioner Ivan C. McLeod (McLeod), the Board's Regional Director, from carrying out the Board's order (R. 9-20). Empresa's motion for a preliminary injunction was denied by the District Judge, Honorable Edmund L. Palmieri, on December 16, 1961 (R. 46-52). The petitioner in No. 93, National Maritime Union of America, AFL-CIO (NMU) was allowed to intervene on the argument of Empresa's motion before Judge Palmieri.

Neither petitioner filed any affidavit in opposition to Empresa's motion, nor was any answer filed. McLeod, however, moved to dismiss the complaint on the grounds that the District Court lacked jurisdiction over the subject matter of the action; that plaintiff sought premature judicial relief; that the court lacked jurisdiction over the members of the Board claimed to be indispensable parties to the action; and that the Board's assertion of jurisdiction and its Decision and Direction of Election were proper (R. 45-46). This motion was in effect denied by Judge Palmieri's decision to accept jurisdiction of the action (R. 50); it was formally denied following entry of the order of the Court of Appeals (R. 86-87).

On Empresa's appeal to the United States Court of Appeals for the Second Circuit, that court reversed and, in an opinion by the Honorable Henry J. Friendly dated January 12, 1962, held Empresa entitled to the relief requested (R. 60-84). An order enjoining the election was entered on February 15, 1962 (R. 87).

On June 11, 1962, petitions for writs of certiorari to the Court of Appeals for the Second Circuit were granted by this Court, without opposition (R. 88; 370 U. S. 915).

Facts.

The essential facts are not in dispute. They are set forth in the complaint (R. 1-8). No affidavits disputing the factual allegations of the complaint were submitted by either petitioner in opposition to Empresa's motion for a temporary injunction nor was any answer to Empresa's complaint filed.[1]

Empresa is a corporation duly organized in 1941 under the laws of the Republic of Honduras with its principal office and place of business in Puerto Cortes, Honduras. Its principal business is owning and/or operating 13 seagoing vessels which are registered under the laws of Honduras, fly the Honduran flag, and are manned by unlicensed seamen employed in Honduras by Empresa under shipping articles executed in Honduras (R. 1).

All but one of these seamen are citizens of Honduras. The one non-Honduran citizen is a Jamaican. At the time of the making of the motion for an injunction Empresa

[1] In its brief, NMU has gone outside the record before this Court by referring to the proceedings before the Board, which record was not before the courts below. If such references are accepted by the Court, Empresa respectfully refers to Appendix B to this brief.

employed approximately 335 unlicensed seamen. All of these seamen, with 4 possible exceptions, were also residents of the Republic of Honduras (R. 4).

Empresa is a wholly owned subsidiary of United Fruit Company (UFCO), a New Jersey corporation. However, none of its officers or directors is employed by or is associated with UFCO and since its formation in 1941 all of its officers and directors have resided in Honduras (R. 2).

Empresa owns ten of the seagoing vessels which it operates. It acts as agent for Balboa Shipping Company Inc., a Panamanian subsidiary of UFCO, in the management of three additional vessels which are owned by Balboa Shipping Company Inc. These thirteen vessels are presently time chartered to UFCO and call at various ports in Central and South America, the United States, Canada and Europe. All of them call regularly at Honduran ports for trade and renewal of Ship's Articles. Each vessel is registered under the Honduran flag. Empresa has never owned or operated American flag ships (R. 2-3).

Existing collective bargaining agreement with Honduran union.

Since 1941 the unlicensed seamen employed by Empresa have been represented by Sociedad Nacional de Marineros de Honduras (Sociedad), a Honduran labor union recognized by the Republic of Honduras under the Honduran labor law as their collective bargaining agent. Collective bargaining agreements have been in effect between Empresa and Sociedad since 1942. The agreement now in effect is dated March 29, 1957. With certain adjustments as to wages and related matters, this contract has been in effect at all times since said date and has been renewed

by its terms until February 15, 1963 (R. 4).[2] The Spanish original and translation are annexed to the complaint but only the translation has been printed. Among the pertinent provisions of this agreement (R. 22-35) are these:

> 1. Sociedad is organized and existing under the laws of the Republic of Honduras with its head office in Puerto Cortes, Honduras, and was recognized as a juridic person by the Minister of Interior, Justice, Sanitation and Public Welfare of Honduras under date of May 17, 1940.
>
> 2. Empresa is organized and existing under the laws of Honduras with its head office in Puerto Cortes and was recognized as a juridic person by the Minister of Interior, Justice, Sanitation and Public Welfare of Honduras under date of March 28, 1941.
>
> 3. Both the President of the Board of Directors of Sociedad and the President of the Board of Directors of Empresa reside in Honduras (R. 22).
>
> 4. Empresa recognizes Sociedad
>
> "as the sole representative of all seamen employed or to be employed on board the Honduran flag ships owned by, operated by, or for which the Company [Empresa] is agent, in all things pertaining to conditions of employment with the Company, or to the disputes, or controversies that may arise between said seamen and the Company regarding conditions of work on board the vessels or to the stipulation of this contract. Consequently all members of the Association [Sociedad] that may be employed on the Company's ships shall be subject to and must comply with the stipulations of this contract." (R. 23)

[2] The Board erroneously assumed that this collective bargaining agreement expired in April 1961 (R. 17, Fn. 23). However, the uncontradicted record before this Court shows that the agreement will remain in effect at least until February 15, 1963 (R. 4).

5. The employment by Empresa during the term of the contract only of seamen who are members of Sociedad except where Sociedad is unable to furnish such seamen. (R. 23)

6. Empresa's obligation to continue to pay members of the crew whenever Empresa's ships are in a foreign port stranded or under repairs or being cleaned or for other reasons, the salary provided for in said contract and to furnish such seamen with room and board. (R. 24)

7.

"Every member of the association [Sociedad] who is a member of the crew of any of the Company's [Empresa] ships shall at all times be under the orders of the Captain whose instructions and those of the officers of the ship he shall obey at all times. The Company [Empresa] may at any time dismiss any member of the crew whose services or conduct, in the judgment of the Company [Empresa], may not be satisfactory, or if he should disobey the orders of the Captain and any other Officers of the ship, or for insubordination or disregard of the ship's discipline, without prejudice to other responsibilities to which he may be liable. * * * Any member of the crew who considers that he has been unjustly dismissed may appeal the matter direct to the management of the Company [Empresa]. If the matter is not satisfactorily settled on this level, in such event, the matter shall be considered a dispute and must be handled and disposed of in the manner provided for in Article 11 of this contract." (R. 25)

Article 11 (R. 27) provides that during the term of the contract there shall be no lockout by Empresa, no declaration of strikes or suspension of work by Sociedad or its members "on account of labor controversies or for any other causes". It provides that any such disputes or differences shall be resolved by

arbitrators who, in case of discord, may appoint a third arbitrator and, upon the failure of the arbitrators to name a third "in that case the Commandant of the Honduran port of arrival of the ship shall make the appointment". It is provided that the decision of the arbitrators shall be final and binding on the parties and that there shall be no appeal whatsoever.

It is also provided therein:

> "Any dispute arising during the voyage of a ship, shall be resolved in the manner prescribed in this article as soon as the vessel reaches a Honduran port, but if the vessel is not returning to Honduras within a term of 60 days, then the dispute shall be submitted abroad to the decision of the Official or person designated by the Government of Honduras for that purpose, and his decision shall have the same final effect as the decisions of the aforesaid arbitrators of fact." (R. 27).

8. Provisions for the payment of compensation for any loss of life or temporary or permanent incapacity of any seaman while the contract is in effect resulting directly from a maritime labor accident. The compensation is to be made in accordance with Title XI of the Organic Law of the National Merchant Marine of Honduras (Decree No. 55 of March 3, 1943). It is further agreed that the accidents contemplated by this clause are those defined by Article 35 of said Law as maritime labor accidents. (R. 25-26)

Provision for the payment by Empresa for the cure, medical attention or hospitalization of any seaman temporarily incapacitated and left in port. (R. 26)

9. Termination of employment of a seaman upon the termination of a ship's voyage when Sociedad notifies Empresa in writing that he is not an active member of Sociedad.

10. Wages (R. 27, 28, 29)

11. Vacations (R. 29-30)

12. Payments for medical, surgical, pharmaceutical and hospital expenses in the event of nonoccupational and nonculpable illness and in the case of occupational illness. (R. 30-31)

13. Repatriation in case of illness, injury, discharge, shipwreck or for any other causes. (R. 31)

14. Hours of work. (R. 31-32)

15. Overtime rates of pay. (R. 33)

All of the unlicensed seamen employed by Empresa are members of Sociedad, as required by paragraph 3 of the agreement (R. 5, 23). Under Honduran law Empresa is required to recognize Sociedad as the exclusive bargaining agent of its unlicensed seamen (R. 5).

Labor grievances concerning the unlicensed seamen employed by Empresa are handled by representatives of Empresa and Sociedad, including referral of such grievances to the Public Solicitor of the Ministry of Labor of Honduras, the Labor Courts of Honduras and to the Minister of Labor of Honduras (R. 5).

Labor and Maritime Laws of Honduras

The Republic of Honduras has a long established and comprehensive system of laws and regulations governing all aspects of the ownership and operation of vessels registered in Honduras and the employment of personnel thereon. Empresa is required to and does comply with these laws and regulations (R. 3, 4). Thus

a. Each such vessel is required to carry on board a "Patente Definitiva de Navegacion" ("Patente") issued by the Republic of Honduras under signature of the Port Commandante of its home port (Puerto

Cortes or Tela) evidencing ownership of said vessel. Such ownership is also inscribed in the Registry of Sea-going Vessels maintained by the Port Commandante.

Prior to the issuance of each Patente the owner must file in accordance with the requirements of the laws of the Republic of Honduras an application with the Republic of Honduras at Tegucigalpa enclosing with the application the bill of sale proving ownership of the vessel and must comply with certain other requirements under Title 2, Ley Organica de la Marina Mercante Nacional (1943).

b. Each such vessel is required to carry on board a safety equipment certificate issued by the Republic of Honduras, a navigation license, navigation log, crew roll, cash book, cargo book, compass log, tonnage certificate, load line certificate, charter party and a copy of the Commercial Code of Honduras and, if it carries radio equipment, the ship's station must be licensed by the Republic of Honduras and employ call letters and frequencies assigned by the Republic.

c. The officer personnel employed aboard such vessels must be licensed by the Honduran Government.

d. All unlicensed seamen in order to secure employment on such vessels of Honduran Registry are required to furnish a birth certificate, a Honduran passport, a Honduran seaman's identification book, the issuance of which is governed by Articles 56-64 of the Honduran Merchant Marine Act, and Articles 236-7-8 of the Honduran Labor Code, a certificate of military inscription and a vaccination certificate. All unlicensed seamen are required to undergo physical examination by a physician and must secure a medical certificate signed by this physician and a Honduran health official.

e. Each such seaman is required, before he leaves Honduras, to sign the Ship's Articles maintained in accordance with Article 24 of the Honduran Merchant Marine Act which lists the name of each seaman, his age, marital status, place of birth, nationality, domicile and name and address of next of kin. The Ship's Articles are certified by the Port Commandante in Honduras (R. 3-4).

f. Labor grievances are processed in the labor courts of Honduras and the Ministry of Labor of Honduras (R. 5)

Under the laws of Honduras, the petitioner NMU cannot gain recognition by the Honduran Government and could not lawfully represent the seamen involved. Articles 490 and 504 of the Honduran Labor Code provide in translation as follows:

"Article 490: No union may be permitted to act as such nor to exercise the functions prescribed to it by law or by its respective by-laws, nor to exercise its rights so long as it does not have recognition of its juridic personality, and may act as such only during the time it is so recognized."

"Article 504: No union may function whose personnel is not composed of at least ninety per cent (90%) of Honduran citizens. No matter what is the form of direction of the union, no alien is eligible for directive posts." (R. 5)

NMU does not have Honduran recognition of its juridic personality and less than 90% of its members are citizens of Honduras (R. 5).

The Board Decision

The Board's assumption of jurisdiction seems to have been predicated on UFCO's ownership of Empresa's stock

and the fact that as time charterer of Empresa's ships UFCO directed movement of the vessels. Thus the Board found that "the Empresa vessels are wholly integrated in UFCO shipping operations" (R. 15) and that

> "UFCO, as the time charterer of the vessels, determines what voyages they shall make, their ports of call, their length of stay in various ports, and what cargoes they shall carry. In exercising its control, UFCO deals directly with the captain of the vessel involved. If it is dissatisfied with the handling of a vessel by its officers or crew or with its mechanical or other condition, it directs its complaints directly to Empresa, which is responsible for making any necessary changes. The ships are used, for the most part, to carry produce of UFCO's Latin American operations, and on any given trip may call at ports in various Central and South American countries including those of Honduras." (R. 14-15)

Yet in almost the same breath the Board recognized that UFCO's control of the vessels was only the typical control of a time charterer,[3] that all labor relations are in fact handled exclusively by Empresa as owner and operator of the vessels, and that UFCO's "control" would be the same whether the vessel was beneficially owned by the charterer or by some third party in which the charterer had no financial interest. Thus the Board found (R. 14):

> "As the owner and operator of the vessels under time charter, Empresa must provide ships that are fully equipped and ready to put to sea. Thus, it is responsible not only for the physical condition of the ships and for provisioning them, except for fuel, but

[3] A time charterer hires a vessel fully manned and ready to put to sea, which vessel is operated and managed by the owner, as distinguished from a bareboat or demise charter in which the charterer hires the vessel and mans it with his own crew. Gilmore and Black, *The Law of Admiralty* (1957) at pp. 170-171.

> also for hiring the officers and crews and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel. There is nothing in the record to suggest that Empresa does not in fact carry out these typical responsibilities of the owner of a vessel under a time charter." (R. 14)

Despite these and other factual findings which clearly established that *all* labor relations aboard the vessels owned and/or operated by Empresa were handled exclusively by it and the Honduran union, Sociedad, pursuant to the labor laws of Honduras, the Board found that the "contacts" of Empresa's vessels with the United States were substantial enough to require application of our labor laws rather than those of Honduras (R. 16-17); it incorrectly assumed (without making inquiry of the parties) that the collective bargaining agreement between Empresa and Sociedad had expired by its terms (R. 17, fn. 23); it concluded that Empresa's sole stockholder, UFCO, having time chartered the vessels, was a joint employer with Empresa of the seamen involved (R. 16); and it ordered that a representation election be held on a ballot which entitled the seamen to elect between NMU, Sindicato Maritimo Nacional de Honduras ("Sindimar"), a Honduran union which the Board permitted to intervene after the hearing had been closed (see R. 17, fn. 22), or no union (R. 18-19).

Sociedad, the Honduran union which represents all of the seamen involved and with which Empresa has an exclusive bargaining agreement entered into pursuant to Honduran law, was not even listed on the ballot! A foreign employer, its foreign seamen aboard its foreign flag vessels in maritime commerce, and their foreign union, though all admittedly subject to the labor laws and regula-

tions of Honduras, the nation of their allegiance and domicile, were thus held also to be subject to the conflicting labor laws and regulations of the United States.

The Board ruling not only requires this foreign employer to breach a lawful collective bargaining agreement with its foreign employees and their foreign union but may also require the employer to further violate the laws of its domicile by bargaining with a union which concededly could not be recognized under Honduran law as the lawful representative of the seamen involved. As the unanimous Court of Appeals found, the Board decision has sown the seeds of continuous conflict between the regulatory measures of the two jurisdictions to which Empresa and its employees have now been held subject (R. 78; 300 F. 2d 222 at p. 234).

Protests by the Honduran Government

On November 29, 1961, after issuance of the Board's order of November 15, 1961, His Excellency Celeo Davila, Ambassador from Honduras to the United States, communicated with His Excellency Dean Rusk, Secretary of State of the United States. A copy of this communication, referred to in the opinion of Judge Friendly below (R. 63-64), is annexed as Appendix C to this brief. Ambassador Davila referred to Articles X and XXII of the Treaty of Friendship, Commerce and Consular Rights between Honduras and the United States, signed at Tegucigalpa, Honduras, on December 7, 1927 [45 Stat. 2618], as follows:

> "Article X of the Treaty provides that merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on

the high seas, be deemed to be the vessels of the Party whose flag is flown.

The National Labor Relations Board by asserting jurisdiction over the Honduran seamen aboard vessels carrying the Honduran flag has violated this provision that considers as vessels of Honduras those flying its flag.

It has also violated Article XXII of said Treaty which reads in part: 'A Consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit'.

The Articles X and XXII of said Treaty are very clear and there is no doubt that wages and contracts are matters dealing with internal order of the vessels, and are therefore subject exclusiveiy to the laws of the State of registry and flag."

On January 10, 1962, the Department of Justice by the Honorable William H. Orrick, Jr., filed the following communication relating to this Honduran note with the Honorable Alexander Holtzoff, United States District Judge, in the action brought by Sociedad against the members of the National Labor Relations Board, the appeal in which is to be argued with the instant cases:

"As a result of your inquiry I have songht to ascertain the views of the Department of State with respect to the Honduran Note of November 29, 1961 attached to the complaint in the above-entitled action [*Sociedad Nacional de Marineros de Honduras* v.

McCulloch, et al. Civil Action No. 4020-61]. The Department of State informs me that, although the Department does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case." (R. 85)

A copy of this communication was filed with the Court of Appeals (R. 64, 85).

On December 8, 1961, Empresa received from the Government of Honduras an official ruling of its Ministry of Labor to the effect that the action of the Board in this case, in assuming jurisdiction over the respondent and its unlicensed seamen and in directing the election, is a violation of the sovereignty of the Republic of Honduras and null and void under its law (R. 5). A translation of this ruling is attached to the complaint (R. 36-42).

Summary of Argument.

This Court held in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957) that "Congress did not fashion it [the LMRA] to resolve labor disputes between nationals of other countries operating ships under foreign laws" (at p. 143), and that Congress "alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." (at p. 147).

The difference between the facts at bar and in *Benz* are that the foreign shipowner here is beneficially owned by an American corporation and that here the foreign flag ships upon which the foreign seamen are employed make regular calls to the United States ports. In this case, as in *Benz*, there is a total absence of Congressional intent to apply the LMRA to these foreign ships and foreign seamen. The policy considerations for and against

applying the labor laws of the United States to foreign vessels are far more complex than in *Benz*. The task of resolving these legislative problems to which diverse solutions have been presented by petitioners and *amici curiae* should be left to Congress.

Established canons of statutory interpretation require that in the absence of a clear statement of Congressional intent, an Act of Congress should be interpreted to accord with the law of nations; so as not to abrogate treaty obligations; so as not to apply extraterritorially; and so as not to raise a constitutional question. For hundreds of years the law of nations has required that the internal affairs of seagoing vessels and the general regulation of the rights and duties of the officers and crew towards the vessel and among themselves should be governed by the law of the flag nation. Labor relations are clearly within this well settled principle. A treaty between the United States and Honduras (the flag state here) requires Honduran law to govern the relations between these Honduran seamen and their Honduran employer on these Honduran flag vessels. The absence of a clear expression of Congressional intention to regulate labor management relations on foreign vessels, requires that these principles and our treaty obligations be respected.

If Congress had intended the LMRA to apply, it would have exceeded its powers under Article I, Section 8, and Section 2 of Article II of the Constitution of the United States. Such action also would violate the Fifth Amendment to the Constitution.

The District Court had the power to enjoin the action of the Board since the action of the Board was in excess of its powers under the Act and, moreover, violated respondent's constitutional rights.

ARGUMENT.

POINT I.

The Labor Management Relations Act, 1947, as amended does not extend to the organizational and collective bargaining activities of the unlicensed seamen here involved.

All parties agree that the basic question is whether Congress intended the LMRA to apply to Empresa's foreign flag ships. Despite the universal coverage of its literal language, the legislative hearings and findings show that it was not the purpose of Congress to regulate working conditions on foreign flag ships.

This Court so held in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), where Mr. Justice Clark stated at pp. 143-144:

> "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees. • • • The report declares further that because of the inadequacies of legislation 'the *American* workingman has been deprived of his dignity as an individual,' and that it is the purpose of the bill to correct these inadequacies. (Emphasis added.) H. R. Rep. No. 245, 80th Cong., 1st Sess. 4. What was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions."

The ship in *Benz* was owned by a Panamanian corporation and sailed under the Liberian flag. The crew, made

up entirely of nationals of countries other than the United States, principally German and British, had signed a British form of articles of agreement in Germany. The conditions of employment prescribed by the British Maritime Board were incorporated into the Articles of Agreement including wages and hours of employment. While the ship was in the harbor at Portland, Oregon for repairs, to load a cargo of wheat and complete an insurance survey, the crew went on strike aboard the vessel in furtherance of demands for higher wages and more favorable working conditions. The crew was ordered to leave the ship and did so. Thereafter a series of three American unions participated in picketing the ship and injunctions against them were entered by the District Court. In addition to injunctive relief, the employer claimed damages for picketing for an unlawful purpose under Oregon law. The unions contended that the LMRA had preempted the field and therefore that the District Court was without jurisdiction to entertain the suit. The District Court held that the LMRA did not apply because it "is not intended to, nor does it cover a dispute between a foreign ship and its foreign crew", and awarded damages. This Court affirmed. The sole question decided was

> "whether the Labor Management Relations Act of 1947 applies to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port. We decide that it does not, and therefore do not reach other questions raised by the parties." (353 U. S. 138 at pp. 138-139)

Mr. Justice Clark, speaking for the Court, held:

> "And so here such a 'sweeping provision' as to foreign applicability was not specified in the Act. • • • We cannot read into the Labor Manage-

ment Relations Act an intent to change the contractual provisions made by these parties. For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts." (at pp. 146-147)

Benz is decisive of the instant case. Here too, the ship is foreign, the employees are foreign and the employer is foreign. While the stock of Empresa is owned by an American corporation there is no indication that Congress intended a different result where American investors acquire interests in foreign enterprises. In *Benz* nothing was said as to the nationality of stockholders of the Panamanian ship owner.

Moreover, the record shows conclusively that Empresa is an independent corporate entity and is in no sense an "instrumentality" of its parent. In fact, the Board so found:

> "Empresa is, as noted, one of UFCO's wholly-owned subsidiaries. It was organized under the laws of Honduras in 1941 by UFCO which supplied the capital for the venture. Empresa's officers are elected by its directors who are in turn elected by the sole stockholder, UFCO. There are, however, no interlocking directors with, or offices common to, Empresa and its parent. Furthermore, Empresa maintains all its own records, holds real estate in its own name, and otherwise *appears to function as a distinct corporate entity*. It is engaged in the business of owning and operating vessels registered under the laws of Honduras" (R. 13) (emphasis added).

As Judge Friendly pointed out, this "subsidiary had been formed long before controversy arose and none of the ordinary bases for piercing the corporate veil exist" (300 F. 2d 222 at p. 233).

The fact that these ships were time chartered by UFCO does not alter the situation. There was no showing of any difference between the chartering of these foreign ships by UFCO and the chartering of any other foreign ships. The time charterer of a vessel always controls the voyages it makes, the cargo it carries, the ports of call, etc. (see Scrutton, *Charter Parties* 280-2 (15th ed. 1958) and fn. 3 on p. 12 hereof). The time charterer always uses the vessel in the course of its regular business operations. Surely it is not contended that our labor laws apply to all foreign flag ships time chartered by American corporations!

So far as this controversy is concerned, the important and conclusive fact is that Empresa has full and exclusive control of labor management relations aboard its vessels. The time charterer, UFCO, has no part whatever in the internal management of these vessels. There is no question that Empresa independently performs all of the functions of an owner of vessels under time charter. The Board so found:

> "As the owner and operator of the vessels under time charter, Empresa must provide ships that are fully equipped and ready to put to sea. Thus, it is responsible not only for the physical condition of the ships and for provisioning them, except for fuel, but also for hiring the officers and crews and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel. *There is nothing in the record to suggest that Empresa does not in fact carry out these typical responsibilities of the owner of a vessel under a time charter*" (R. 14) (emphasis added).

The Board further found that "The crews are hired [by Empresa] in Honduras, are composed almost entirely of citizens of that country, and sign Honduran shipping articles" (R. 14, fn. 15). It also found that "Empresa, as part of its control over personnel, has bargained with a Honduran organization as representative of the crews of its vessels" (R. 14, fn. 16).

Similarly, the fact that these vessels call regularly at United States ports is not significant since it is not contended that the LMRA applies to all foreign vessels which come regularly to the United States (see Board brief page 35). It would therefore appear that in the Board's view the significant difference between these foreign vessels chartered by an American corporation and other time chartered foreign vessels calling regularly at United States ports is the fact that the Honduran corporate shipowner in this case is beneficially owned by an American corporation.

The fact that the stock of this admittedly independently operating foreign corporation is owned by a United States corporation does not alter the conclusions reached in *Benz*. As in *Benz* the "question * * * narrows to one of intent of the Congress as to the coverage of the Act" (353 U. S. 138 at p. 142). Since, as it was held in *Benz*, Congress did not consider the problems involved in applying the Act to foreign seamen on foreign vessels hired by a foreign employer, it obviously did not consider the refinement of those problems presented here—i.e., an independently operating foreign corporate employer beneficially owned by an American corporation. Since what Congress did say "inescapably describe[d] the boundaries of the Act as including only the workingmen of our own country and its possessions" (353 U. S. 138 at p. 144) it is evident that the intent of Congress was not to apply the Act in the situation here presented. The Solicitor General states that

the *Benz* "reasoning is equally applicable to the present cases, and compels the conclusion that the Act similarly does not cover the foreign flag ships here involved." (page 26 of Brief for the United States)

As in *Benz*, the presumption is that Congress did not intend to interfere "in such a delicate field of international relations" unless its "affirmative intention" to do so is "clearly expressed." There is no such clear expression of legislative intent in the Act and this Court has so found.

The decision in *Benz* is in accord with long established canons of statutory construction all of which require an "affirmative intention of the Congress clearly expressed" before an Act of Congress is interpreted in such a manner as to interfere in the field of international relations. These canons, which will now be discussed, are equally applicable here.

A. An Act of Congress Should Be Interpreted in Consonance With the Law of Nations, Which Requires Application of the Law of the Flag.

This fundamental canon of statutory construction is singularly appropriate in the field of admiralty where long recognized principles of the law of nations prevail.

In its brief the Board explicitly recognizes the force of the canon:

> "However, even where the scope of a domestic statute is such that it can be applied to vessels flying the flag of another nation, general principles of maritime law and international comity require that an accommodation be made so as to minimize the possibility of collision between two sovereignties, each applying its own laws to the transaction" (p. 25).

Similar recognition is given, in NMU's brief (p. 37). As stated by Mr. Justice Jackson in *Lauritzen* v. *Larsen*, 345 U. S. 571, 577 (1953) a Jones Act case:

> "By usage as old as the Nation, such statutes [shipping] have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."

A multiplicity of nations normally have interests in vessels flying the flag of a single nation. The nation under whose laws the vessel is registered has an interest in protecting the vessel; national prestige is involved and the vessel produces revenue through registration fees, may be requisitioned in wartime and may provide employment for nationals of the flag state. The nation of which the owner of the vessel is a citizen will wish to protect the investment of its national. If the vessel is under charter the nation of the charterer may have a similar interest. The nation whose citizens are employed on the vessel is interested in the welfare of its nationals, and every nation into whose ports a vessel sails has interests in the vessel.

The Republic of Honduras has a substantial and compelling interest in the welfare of its citizens employed on these ships, registered under its laws, exporting its chief produce, and owned by a corporation chartered under its laws, whose main office is in Honduras and whose officers and directors reside there. The extent of that interest is evidenced by the official protests which have been filed by the Honduran government.

Over the years a substantial body of law has developed in reconciling these often conflicting interests, and this Court has long recognized this law of nations. As stated by Mr. Chief Justice Marshall in *Schooner Exchange* v. *M'Faddon*, 11 U. S. (7 Cranch) 116, 137 (1812):

> "A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world."

In *The Charming Betsy*, 6 U. S. (2 Cranch) 64, 118 (1804) Mr. Chief Justice Marshall stated the rule as follows: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country."

1. *Our Courts apply the law of the flag as required by the law of nations.*

One of the most fundamental principles of the law of nations applicable to ships is that the law of the flag governs the internal management and discipline of the ship. The principle, which this Court has held to be of "cardinal importance" (*Lauritzen* v. *Larsen*, 345 U. S. 571, 584) was early recognized in *Wildenhus's Case*, 120 U. S. 1, 12 (1887) in which Mr. Chief Justice Waite stated:

> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity

> of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require."

Accord: *St. Clair* v. *United States*, 154 U. S. 134, 152 (1894); *United States* v. *Flores*, 289 U. S. 137, 156-157 (1933).

In *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959), Mr. Justice Frankfurter stated the practical necessity for applying the law of the flag:

> "To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country." *Id.* at p. 384.

Application of the LMRA to the vessels involved in this case without any question would interfere with (in the words of Mr. Chief Justice Waite in *Wildenhus*) the "internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves." The scope of regulation set forth in the LMRA clearly regulates matters long considered "internal discipline of the ship". *McQuade* v. *Compania de Vapores San Antonio, S.A.*, 131 F. Supp. 365 at p. 366 (S. D. N. Y. 1955), holding that seamen's contracts are treated as "matters of internal order or economy"; *Evangelinos* v. *Andreavapor C.I.A.*, 162 F. Supp. 520 at p. 521 (S. D. N. Y. 1958), stating "the general rule as to what law governs matters of the 'internal economy' of a ship, such as wages, is that the law of the flag controls"; *The Hanna Nielsen*, 273 F. 171 (2d Cir.), *cert. dismissed* 257 U. S. 651

(1921), holding that a seaman's contract is governed by the vessel's nationality; and, similarly, *Transportes Maritimos Do Estado v. Almeida*, 5 F. 2d 151 (2d Cir. 1925). See also the British cases discussed in *The Belgenland*, 114 U. S. 355 (1885) holding that seamen's wages are governed by the law of the flag country.

The brief submitted on behalf of the United States graphically points out that because of the "essentially integral character of such relations, only one jurisdiction can effectively regulate the problems of union organization and collective bargaining in a single bargaining unit" (p. 32). The United States urges that in this case to avoid "potential clashes" between sovereign nations, the law of the flag should govern these relations (pp. 33-37).

In the case at bar, application of flag law is required by Articles X and XXII of the Treaty betwen Honduras and the United States (*infra*, pp. 64-65). As this contract between the two nations is in full force and effect (as both nations have certified in the record here), the treaty provisions are the supreme law of the land and must be honored and applied wherever appropriate by the courts and administrative agencies of the United States.

2. *Other nations also apply flag law.*

Many of the maritime nations have comprehensive labor laws. (Canada, England, France, Germany, Italy, Netherlands, Norway, Honduras, Panama and others). No case has been found, however, in which any nation (other than the United States) has attempted to apply its labor laws to foreign flag vessels.

In fact Canada has expressly refrained from doing so. *Seafarers' Int'l Union of North America (Applicant) and Iron Ore Transport Co. (Respondent) and National Union of Seamen (Intervenor)*, CCH *Canadian*

Labour Law Reporter (1955-1959) 12,130, No. 16,075, April 3, 1957. In this case the Canadian Labor Relations Board expressly refused to take jurisdiction of a labor dispute arising on vessels owned by Canadians but registered in the United Kingdom. The Board based its decision on the principle that the law of the flag governs matters of internal management, discipline, and relations between master and crew and that labor relations are included within the concept "internal management" and "relations between the master and crew". Canada's labor laws are similar in many respects to those of the United States. Cf. Canada's *Industrial Relations and Disputes Investigation Act*, Can. Rev. Stat. c. 152 (1952), establishing the Canada Labor Relations Board which has duties similar to those of the National Labor Relations Board.

The principles of international law upon which the Canadian Board relied are uniformly upheld by writers in the field of international and martime law. Cf. Colombos, *International Law of the Sea*, Sec. 343 *et seq.*, (4th Ed., 1959); Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), page 191 *et seq.* See also the resolution adopted by the Institute of International Law, Amsterdam 1957, Resolution No. IV, Annuaire, Vol. 47 (1957); and the United Nations Conference on the Law of the Sea, Geneva 1958, Article 19.

When other nations do apply their laws to foreign flag vessels, the laws applied are clearly laws which do not pertain to the internal order of the vessel, such as criminal laws and maritime laws concerning salvage, pilotage, collision, harbor safety, etc. See e.g. 35 Halsbury, *Laws of England* 17 (3d ed. 1961); Judgment of 12 June 1952, France, Cour de Cassation (Ch. crim.), 80 *Journal du Droit International* 379; *In re Fattori*, Italy, Court of Cassation (Crim. sect.) (1948), 1949 *International Law Reports* 143;

Procurator General v. *A and D*, Holland, Court of Cassation (1948), 1948 *International Law Reports* 114; *Re Bianchi*, Argentina, Camara National Especial (1957), 1957 *International Law Reports* 174.

The Government of France has even refrained from applying its penal laws to offenses committed in its ports on foreign flag vessels. The French Conseil d'Etat in 1806, in the case of *The Sally* and *The Newton*, refused to apply its penal laws to offenses committed aboard American ships in French ports. The court held that it would not interfere in the internal matters of a foreign flag vessel unless the offenses compromised the tranquility of the port. This illustration of France's strict adherence to the traditional attitude of restraint toward the regulation of internal affairs on foreign flag vessels was recently reaffirmed by a decision of the French Court of Cassation (Chambre Criminelle, 1952), 80 *Journal du Droit International* 379. In another recent case, the French court expressly refused to apply its labor laws to a dispute between a French employee and a French company whose registered office was in Vietnam. *Vidal* v. *Societe Lucien Berthet et Cie*, Tribunal de Grande Instance de la Seine (1960), 88 *Journal du Droit International* 410. The court based its decision on the following factors: foreign registry of the company, performance abroad, contract concluded in Saigon, salary calculated in Indo-Chinese currency. Though no case was found in which a French Court has dealt with the applicability of French labor laws to foreign flag vessels, it would appear from the factors emphasized in the *Vidal* decision that France would not apply its labor laws to foreign flag vessels.

There is no indication that Congress intended the Board to depart from established principles of international law

and to interfere in affairs which, under the law of nations, are clearly the concern of Honduras.

B. An Act of Congress Should Be Construed So As Not to Abrogate a Prior Treaty Unless the Intent of Congress To Do So Is Clearly Expressed; the Board's Construction of the LMRA Would Violate the Honduran Treaty.

On December 7, 1927 a "Treaty of Friendship, Commerce and Consular Rights" was entered into between the United States and the Republic of Honduras (45 Stat. 2618-2640 [1929]). Article X thereof provides:

> "Merchant vessels and other privately-owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown."

And Article XXII provides:

> "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit."

The treaty clearly and explicitly incorporates by its terms the principles of law of the flag and the internal order doctrine discussed hereinabove. Since, as has been

demonstrated, labor relations are unquestionably within the doctrine, and the doctrine is incorporated within the treaty, an assertion of Labor Board jurisdiction on the facts of this case is in clear violation of the terms of the treaty.

Petitioners allege that application of the Act on board these vessels would not interfere with their "internal order". Yet it could result in the election of an American labor union as bargaining representative for these Honduran seamen (in contravention of Honduran law) and inevitably would result in the imposition upon the shipowner of a duty to refrain from committing unfair labor practices as defined not by Honduran but by American law. As a result entirely new terms of employment judged according to American law would supersede the present terms which are governed by Honduran law. In short, the law governing the relations of seamen and shipowner (certainly an integral part of the "internal order" of the vessel) would be changed from Honduran law to American law. Empresa and its employees would be whipsawed between the conflicting labor laws of two nations.

The Republic of Honduras, in the Note submitted by its Ambassador to the United States, has construed its treaty with the United States as recognizing Honduras' exclusive jurisdiction over the labor relations on board its ships. The Government of the United States has taken the same position in the briefs which it filed with the Board and with this Court (Brief of the United States, p. 43-44).

In *Cook* v. *United States*, 288 U. S. 102, 120 (1933), this Court held that "a treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." See also *Choate* v. *Trapp*, 224 U. S. 665 (1912).

There has been no suggestion of an intention by Congress to abrogate or modify this treaty by the labor legisla-

tion here involved or by any other statute. In fact, neither the Honduran nor any other treaty is mentioned in the legislative history of the Act.

C. When Congress Has Intended To Legislate With Reference to Foreign Flag Vessels It Has Done So Expressly; No Such Intention Is Expressed In the LMRA.

A consideration of other federal statutes affecting maritime affairs indicates that Congress, when it has intended to apply its enactments to foreign flag vessels, has so provided in clear and explicit language.

The Seamen's Act of March 4, 1915, 38 Stat. 1164, 1169, 46 USC §599(e), which forbids the payment of seamen's wages in advance, extends by its terms to "foreign vessels while in waters of the United States." This Court has interpreted that statute as not applying to a case where "the contract and payment were made in a foreign country where the law sanctioned such contract and payment." *Sandberg* v. *McDonald*, 248 U. S. 185, 195 (1918); *Jackson* v. *S.S. Archimedes*, 275 U. S. 463 (1928). Likewise the 1920 amendment of §4 of the Seamen's Act, 41 Stat. 1006, 46 USC §597, which granted to every seaman on a vessel of the United States the right to demand one-half of his then earned wages at every port the vessel entered during the voyage, was made specifically applicable to "seamen on foreign vessels while in harbors of the United States," with an additional promise that "the courts of the United States shall be open to such seamen for its enforcement." This latter provision was upheld by this Court in *Strathearn Steamship Co.* v. *Dillon*, 252 U. S. 348 (1920).

Similar precision with respect to application to foreign flag vessels is found in numerous other federal maritime regulatory statutes, including the Steamboat Inspection

Act, 46 U. S. C. §§361-367, the Dangerous Cargo Act, 46 U. S. C. §§170-170b, the Load Lines for American Vessels Act, 46 U. S. C. §§85-88i, the Passenger Act, 46 U. S. C. §§151-163, regulations as to lifesaving appliances, 46 U. S. C. §481, cargo vessel passenger limits, 46 U. S. C. §882, and the Officers' Competency Certificates Convention, 46 U. S. C. §224a.

In all of these statutes Congress has specified whether the statute applied only to American flag vessels or to foreign flag vessels destined for United States ports, as well. As to foreign flag ships Congress has regulated only those aspects of the operation of such ships which are susceptible of local regulation without interfering with concurrent regulations of the flag country or other ports of call. *In none of these instances has Congress presumed to regulate continuously or generally the operation or administration of foreign flag vessels*, as would the Board order here. In view of the historical reluctance of Congress to assume full regulatory jurisdiction of foreign flag vessels it would not be proper to assume, in the absence of a clearly expressed affirmative intention to the contrary, that Congress intended the Act to apply to the situation here presented.

D. In the Absence of a Clear Expression of Congressional Intent to the Contrary, Legislation Is Presumed Not to Apply Extraterritorially.

The application of United States labor law to Honduran seamen, employed by a Honduran corporation with its main base of operations in Honduras, working aboard sea going vessels flying the flag of Honduras, and subject to regulation by Honduran labor law, constitutes an extraterritorial application of United States law.

In many cases courts have construed federal regulatory statutes as not applying even to American citizens or enterprises abroad. The *Apollon*, 9 Wheat. 362, 370-72 (1824); *Brown* v. *Duchesne*, 19 How. 183, 195 (1856); *Sandberg* v. *McDonald*, 248 U. S. 185, 195 (1918); *New York Cent. RR* v. *Chisholm*, 268 U. S. 29, 31 (1925); *Jackson* v. *SS. Archimedes*, 275 U. S. 463, 467 (1928). In view of Congress' demonstrated reservations about asserting jurisdiction over even our own citizens and businesses abroad it would be presumptuous in the extreme to interpret such legislation to apply generally to foreign vessels and their foreign crews.

In *Benz*, Mr. Justice Clark pointed out that the problems involved in the application of its laws extraterritorially "is not a new one to the Congress." He outlined the history of the Seamen's Act of 1915 in which Congress made it unlawful to pay a seaman wages in advance and specifically declared it applicable to foreign vessels while in United States waters. He referred to the decision in *Sandberg* v. *McDonald*, 248 U. S. 185 (1918) in which this Court held that that Act did not apply to wages paid in a foreign country because the Act was "presumptively territorial" and there was no declared policy to apply it extraterritorially, and quoted from the opinion by Mr. Justice Day:

> "Conceding for the present purpose that Congress might have legislated to annul such contracts as a condition upon which foreign vessels might enter the ports of the United States, it is to be noted, that such sweeping and important requirement is not found specifically made in the statute. Had Congress intended to make void such contracts and payments a few words would have stated that intention, not leaving such an important regulation to be gathered from implication." at p. 195.

The decision in *Benz* rests upon a number of other cases involving similar questions in which this Court has held that in the absence of the clearly expressed intention of Congress that legislation shall apply extraterritorially, it will be held not to so apply (e.g. *Neilson* v. *Rhine Shipping Co.*, 248 U. S. 205 (1918); *Strathearn Steamship Co.* v. *Dillon*, 252 U. S. 348 (1920); *Jackson* v. S.S. *Archimedes*, 275 U. S. 463 (1928)).

In *Foley Bros.* v. *Filardo*, 336 U. S. 281 (1949) this Court held that the Eight Hour Law (40 U. S. C. 324) did not apply to an American citizen working for an American contractor in a foreign country even though the terms of the Act were literally universal. Mr. Justice Reed said:

> "No distinction is drawn therein between laborers who are aliens and those who are citizens of the United States. Unless we were to read such a distinction into the statute we should be forced to conclude, under respondent's reasoning, that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land. • • • *An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.*" (at p. 286) (emphasis added).

Labor relations aboard the vessel here involved are obviously "the primary concern" of the Republic of Honduras. The LMRA does not provide for regulation of such relations extraterritorially and hence does not authorize such regulation.

E. A Statute Should Be Construed In Such A Manner As Not To Raise A Constitutional Question.

In *Crowell* v. *Benson*, 285 U. S. 22 (1932) at p. 62, Mr. Chief Justice Hughes held:

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

If Congress should be held to have intended the Act to apply to foreign seamen on foreign flag ships owned by a foreign corporation, there would be serious doubts as to its constitutionality. Point II, hereinafter, discusses certain provisions of the Constitution which militate against such extraterritorial legislation.

F. Board and NMU Contentions

1. *Subsequent enactment by Congress of §14(c)(1) of the Act was not an expression of intention to apply the Act in this situation.*

The Board contends that the subsequent enactment by Congress, of Section 14(c)(1) of the Act (29 U. S. C. §164(c)(1)) in 1959, after the *Benz* decision, indicates a Congressional intent to apply the LMRA to foreign vessels manned by foreign seamen. Section 14(c)(1) provides:

> "The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employes, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the

> Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

This Section was concerned solely with the problem of delineating the jurisdictional boundaries between state and federal labor laws. There is nothing in the legislative history to indicate that Congress was concerned with the foreign flag problem. In House Report No. 741, Senate Report No. 187, and Conference Report No. 1147, Congress made clear that it was exclusively concerned with the problem of the so-called "no man's land" which comes into existence when the Board exercises its discretion to decline jurisdiction and at the same time State courts and agencies are foreclosed from asserting jurisdiction due to Federal pre-emption. See U. S. Code Congressional and Administrative News, 86th Cong., 1st Sess. pp. 2320, 2341, 2371, 2377, 2424, 2440, 2494 and 2509 (1959).

3. *The decision in the* Marine Cooks *case did not limit the decision in* Benz.

The Board also suggests that this Court limited its holding in *Benz* by its decision in *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U. S. 365 (1960). In that case this Court held that the Norris-LaGuardia Act (29 U. S. C. §§101, 104) deprived the Federal Courts of jurisdiction to enjoin picketing of a foreign flag vessel while temporarily in a United States port. However Mr. Justice Black pointed out the relevant basic differences between the Norris-LaGuardia Act and the LMRA:

> "Congress passed the Norris-LaGuardia Act to curtail and regulate the jurisdiction of courts, not,

> as it passed the Taft-Hartley Act, to regulate the conduct of people engaged in labor disputes." 362 U. S. 365 at p. 372.

The decision in *Marine Cooks* in no way alters the holding in *Benz*.

3. *The economic and public policy arguments advanced by petitioners are more properly addressed to Congress.*

In its brief the Board outlines various cases in which it has applied the LMRA to "shipping operations having foreign aspects". It is submitted that the Board in these cases has substituted its judgment of what is in the public good for that of Congress. Policy arguments as to whether the LMRA should apply to this type of situation are inappropriate here. As Mr. Justice Jackson stated in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) at p. 593:

> "Nor do we stop to inquire which law does whom the greater or the lesser good. The argument is misaddressed. It would be within the proprieties if addressed to Congress. Counsel familiar with the traditional attitude of this Court in maritime matters could not have intended it for us."

A major problem which would confront Congress in deciding whether it was in the public interest to apply the regulatory scheme of the LMRA in the instant situation is one of international relations.[4] Since under international law the flag state has the exclusive right to govern the labor relations on foreign flag vessels, it is an affront to the sovereignty of the flag state for another nation to assume

[4] It is not without significance that five friendly nations (Canada, Honduras, Liberia, Panama and the United Kingdom of Great Britain and Northern Ireland) have submitted *amicus curiae* briefs in these foreign flag cases.

jurisdiction. In the instant case Honduras has emphatically protested this violation of the law of nations and of explicit treaty provisions.

The problem here is far more serious than it was in *Benz* because the connection of Honduras with these ships, these seamen, and this employer is far closer than the connection of Panama or Liberia with the seamen, employer and ships in *Benz*. The Board order is a most serious affront to the dignity and prestige of a friendly foreign power. The strong protest filed by the Honduran Government and the *amicus curiae* briefs filed by other friendly nations, coupled with the position taken by the Solicitor General of the United States on behalf of the Executive Branch of our Government, give some indication of the serious nature of that affront and of the retaliatory measures which are likely to follow if the Board's order is sustained. (See Brief of the United States pages 7-8, 133-37.)

Moreover, the economy of Honduras is based to a very great extent on the growing and exporting of bananas. Much of the crop is exported on Honduran vessels owned and or operated by Empresa, a Honduran corporation employing Honduran seamen in Honduras. It is appropriate, and, from the standpoint of the Honduran Government, highly desirable that the ships which carry this product should be of Honduran registry, that these ships should be owned by a Honduran corporation and that the seamen on these ships should be Honduran. It is also important to the Honduran Government that the labor relations on such ships should be governed by Honduran law. In these ways the export of its perishable crop is provided for, its citizens are receiving employment and desirable training at sea, and Honduras has become a maritime nation. The consequences to the Government and people of

Honduras of an interruption in the export of its fruit products would be serious. The injection of an American administrative agency, an American union and American labor laws into the labor-management relations on board these ships could have a serious effect on the Honduran economy.

Petitioner NMU states that the vessels have only "symbolic and peripheral Honduran contacts" (p. 14 NMU brief) and further that "In determining the jurisdictional reach of the LMRA, the possibility of conflict with Honduran laws is irrelevant, in addition to being remote and inconsequential" (p. 14 NMU brief). Such a cynical disregard of the legitimate concern of the Republic of Honduras with the export of her major product and the maintenance of her own merchant marine should not be countenanced without an express declaration of Congressional intent.

Moreover, in contrast to the relatively simple situation in *Benz*, the entire complex of regulations contained in the LMRA is sought to be imposed upon this essentially Honduran enterprise, in substitution for the Honduran laws and regulations to which Empresa, its vessels and its employees are now subject and will continue to be subject. As Judge Friendly pointed out:

> "As Mr. Justice Douglas pointed out in his dissent, the Benz case did not directly involve the application of the panoply of labor regulation embodied in §§7, 8, 9 and 10, but only the provisions of §303 of the Taft-Hartley Act relating to picketing, there wholly on American soil; it is hard to believe that foreign governments would be, or under international practice would have any right to be, concerned with whether the rights of their ships to damages for such picketing were governed by Federal or state law. Here, on the other hand, application of §§7, 8, 9 and 10 of the National Labor Relations Act would involve the risk of continuous conflict

> between the United States and Honduras with respect to labor conditions which, though of more interest to the United States than those in Benz, are still Honduras' 'primary concern' * * * *" (R. 76-77, 300 F. 2d 222 at p. 234).

and continuing:

> "* * * the conflict between United States and Honduran law would be constant; far from dealing only with incidents while the ships were in American waters, the Board would be regularly applying the shifting standards of its own decisions, and those of American courts and American legislators, to conduct in Honduras, where the bargaining between Empresa and its employees has always taken place; it would be endeavoring to enforce its will on matters that Honduras, with a better claim, regards as for itself to decide. Compare *Vanity Fair Mills* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633, 646-647 (2 Cir.), cert. denied, 352 U. S. 871 (1956)."

The problem of deciding what is in the best interests of the United States in this situation is one for Congress. The complexity of these problems (in the fields of international shipping, international relations, labor, and national defense) to be solved by Congress is apparent from the hearings held before the Subcommittee on the Merchant Marine of the House Committee on Merchant Marine and Fisheries (study of Vessel Transfer, Trade in and Reserve Fleet Policies) 85th Cong., 1st Sess. (1957) (hereinafter cited as House Hearings), and before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce (Hearings on S. 1488, Ship Transfers to Foreign Flag) 85th Cong., 1st Sess., 1957, hereinafter cited as Senate Hearings) at which a number of

representatives of various interested parties testified.[5] This Court does not have the function nor the facilities for examining all relevant considerations of public policy and deciding which should prevail. The briefs submitted by petitioners present arguments more properly addressed to the legislature. The brief *amicus* filed by the AFL-CIO is devoted almost completely to an analysis of the policy considerations involved and even quotes from recent hearings before Congressional Committees at which these policies were enunciated. It is difficult to conceive of more dramatic proof that the problem here presented (in the absence of an expression of Congressional intent) is a legislative one.

Despite the fact that the resolution of these conflicting interests is a legislative problem, the NMU brief begins

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[5] Testimony was given by Clarence Morse, Maritime Administrator, to the effect that wage-costs under a foreign flag were substantially lower than those under an American flag (House Hearings, pt. 1, pp. 140 ff., 160); and by representatives of American shipping companies in the Senate Hearings (see, e.g. the testimony of James C. Anderson, Executive Secretary of the American Tramp Shipowners Association, p. 229, and of Albert E. Kihn, President of California Shipping Co., at p. 116) who testified with reference to the difficulty faced in meeting competition from foreign flag vessels. The House Subcommittee also heard testimony from representatives of the Department of Defense with reference to the effect of foreign flag registration on national security (House Hearings, pt. 2 p. 552 ff.). Those who appeared for the Department included the Hon. Thomas S. Gates, Jr., Secretary of the Navy; J. M. Will, Vice Admiral, USN, Commander, MSTS; Rear Admiral Albert G. Mumma, Chief, Bureau of Ships; and Howard L. Collins, Rear Admiral, USN, Assistant Chief of Naval Operations (Logistics). Robert Hill, Assistant Secretary of State, testified before the Senate Hearings concerning the problem of international relations involved (Senate Hearings, p. 219). Finally, the House Subcommittee heard testimony from Hoyt S. Haddock, Executive Secretary of the AFL-CIO Maritime Committee, and Harry E. O'Reilly, Executive Secretary-Treasurer of the Maritime Trades Department, AFL-CIO, as to the adverse effect the employment of foreign seamen had on the working conditions of American seamen. House Hearings, pt. 2, p. 684 ff.).

with a presentation to show that American seamen are prejudiced by the employment of foreign seamen at lower wages. Of course, a similar presentation could be made to show why it is necessary to keep shipping costs low in order to compete in foreign commerce. The problem described by NMU is not unique to shipping but one which is present wherever foreign labor is employed. The NMU appears to contend that the LMRA is designed to improve employment conditions here by improving them abroad. There is no indication of such a Congressional intent. As this Court held in *Benz*, these economic and political problems are for the consideration and determination of Congress and not for the courts.

4. *A "contacts" test is inappropriate.*

Petitioners urge that the Board should be empowered to weigh all the competing interests or contacts and decide whether as a matter of policy the LMRA should apply on a given state of facts to foreign shipping. The decision of this Court in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) is said to support this contention and, indeed, the Board so ruled.

Lauritzen, however, involved the application of the Jones Act (46 U. S. C. §688), dealing with the imposition of tort liability, to foreign shipowners for injury to seamen on ships flying a foreign flag. Isolated instances of recovery for personal injuries may justify a weighing of various contact points but a radically different situation is presented in the constant supervision and intrusion upon the internal affairs of a foreign vessel that comes with applying the comprehensive regulatory provisions of the LMRA. Courts have allowed Jones Act recovery to individual seamen employed aboard foreign flag vessels

on the theory that a varying standard of tort liability does not interfere with the internal order of the particular vessel involved. See, *e.g.*, *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927 (2d Cir.), *cert. den.* 287 U. S. 642 (1932), where it was stated at p. 929 "[M]atters of 'internal management' are not involved in an action by a seaman to recover damages for injuries suffered through the negligence of the shipowner."

Thus it has been concluded by one commentator that ". . . usurpation of applicable tort law does not have an impact on the principles of comity comparable to application of the labor acts.

And special humanitarian considerations may motivate a court to allow speedy recovery, under American law, to seamen convalescing in the United States and lacking ready access to a forum in the flag state." Note, *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet*, 69 Yale L. J. 498, 511 (1960).

The Jones Act was enacted against a background of admiralty law in which injured seamen were considered "wards of the Admiralty" and every possible provision was made for their welfare. See 4 Benedict, *Admiralty* (6th ed. 1940), at p. 282. Historically one of the problems which faced an injured seaman far from home was ready access to the Admiralty Court for compensation for his injuries. 1 Benedict, *Admiralty* (6th ed. 1940), at p. 252. In *Lauritzen*, Mr. Justice Jackson emphasized this factor (345 U. S. at pp. 589-590). The policies behind the Jones Act are different from those behind the LMRA.

The policies and scope of the LMRA are quite different and far more complex than those behind the Jones Act. Application of the "contacts" test, a useful tool in reconciling conflicts of law in specific fact situations, does not fit the shifting sands of maritime commerce. Seagoing

vessels, and particularly ships available for charter, may ply between certain ports in one year and between entirely different ports in the next. Ownership interests change from time to time. Frequent reevaluation of "points of contact" would have to be made from time to time in order to determine whether the LMRA or the labor laws of some other country applied.

A second consideration, emphasized by this Court and by Congress, is the practical necessity of having a single governmental regulation of labor management relations. (*Bethlehem Co.* v. *State Board*, 330 U. S. 767 (1947)). The Board's approach, as applied to maritime commerce, would mean changes in the regulation of labor management relations aboard seagoing vessels from port to port as different governments assumed the regulatory function. Such an intolerable result, desruptive of international commerce cannot have been intended by Congress.

The only test that gives the required certainty to applicable law in maritime commerce is the ancient and universally applied principle of the Law of Nations, that the law of flag and registry shall govern with respect to the internal affairs of seagoing vessels.

Honduran law prevails even if the "Contacts" approach is used.

However, even if a substantial contacts test were applied in this case, the Board should not have asserted jurisdiction. In *Lauritzen*, Mr. Justice Jackson listed seven elements to be considered for the purposes of determining the applicability of the Jones Act. They were: (1) Place of wrongful act; (2) Law of the flag; (3) Allegiance or domicile of injured person; (4) Allegiance of defendant shipowner; (5) Place of contract; (6) Inaccessibility of foreign forum and (7) Law of the forum. If these elements are applied to this case it is clear that Honduran

law should apply to the labor management relations aboard these vessels. The vessels are Honduran flag vessels, the seamen are, with one exception, Honduran, they are employed in Honduras under shipping articles executed there, the present collective bargaining agreement was entered into under Honduran law with a Honduran union, the employer is a Honduran corporation and its officers and directors reside in Honduras. For the past twenty years, labor relations between Empresa and its employees have been regulated by the laws, the courts, and administrative agencies of the Republic of Honduras. As Judge Friendly pointed out, the United States contacts "are substantially outweighed for the purpose here at issue, by Honduras' interests" (R. 77).

The flag alone, however, should be controlling here. As Mr. Justice Jackson said ". . . the weight given to the ensign overbears most other connecting events in determining applicable law" (345 U. S. at 585) and it is "of such weight . . . that it must prevail *unless some heavy counterweight appears*", 345 U. S. at 586 (emphasis added). Such heavy counterweight could only be found in some compelling policy underlying the statute in question and which is clearly expressed therein. An analysis of the policy underlying the LMRA, however, leads to the conclusion, stated in *Benz*, that it was intended to apply essentially to domestic United States employment relationships in an effort to improve employment conditions in the United States.

Petitioner NMU appears to contend that Congress intended that the wages of foreign workers should be raised so that domestic salaries and employment will be strengthened. However such a policy would dictate the application of this LMRA to a United States employer who hires workers who work for it abroad. This in effect constitutes a wage tariff on foreign labor. There is no indica-

tion that Congress had any intention to indirectly improve working conditions in the United States by raising wages abroad.

Congress did state an intention to remedy, through the LMRA: "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association. . . ." (29 U. S. C. §151).

Obviously Congress was not concerned with such inequality as it may exist in foreign countries but only as it exists in the United States. The problem with foreign employers and foreign employees is whether any "inequality" between them is a concern of the United States or a concern of a foreign country. The relevant facts here are: (i) place of primary employment of the employees and (ii) the situs of the essential personnel and management functions of the employer. In this case Empresa's employees are employed on Honduran vessels and spend most of their time on the high seas. The personnel and employment functions of the employer are performed in Honduras. Control over where the vessels call is exercised by United Fruit in the same manner in which it would exercise such control over any ships it time chartered. Under these circumstances it is apparent even on a "contacts" approach that the LMRA should not apply.

POINT II.

The Board's action in directing a representation election among respondent's foreign seamen on its foreign flag ships, if authorized by the LMRA, would be unconstitutional.

In the discussion to follow, we have assumed, *arguendo*, that Congress intended the LMRA to apply here and so declared with unmistakable clarity. On this assumption, we submit that for the reasons which follow, the Congress would have exceeded its constitutional powers.

A. Article I, Section 8 of the United States Constitution.

Legislation purporting to regulate labor relations in a foreign land, would, we submit, be beyond the constitutional powers of Congress. This would also be true with respect to labor relations on a foreign flag ship when beyond the territorial limits of the United States, and particularly so where shipowner and crew are also foreign.

Article I, Section 8 of the United States Constitution provides:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

This grant of power extends to the full scope of the national sovereignty over matters of commerce which affect the United States. In *Gibbons* v. *Ogden*, 9 Wheat. (22 U. S.) 1 at pp. 193-194 (1824) Chief Justice Marshall held:

> "It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign

> nations. No sort of trade can be carried on between this country and any other, to which this power does not extend."

There are, however, limits upon the power of Congress to regulate commerce with foreign nations, which are inherent in the very nature of the sovereignty being exercised. Article I of the Constitution assigns the "legislative powers herein granted" to Congress. But the People did not and could not assign powers which they did not have. To grant power to regulate contracts between foreign employers and foreign employees on board foreign flag ships impliedly recognizes the same power in another sovereign to regulate such contracts between American workers and American employees on American flag ships. Such power would amount to a limitation on the full and total sovereignty of the People within the United States' own territory. The framers of the Constitution obviously did not envisage any such limitation on the power of the People within their own land. They recognized that the power of the sovereign to extend its influence beyond the borders of its own territory exists in the context of the Law of Nations.

The Constitution must be read in light of the law of nations. *Respublica* v. *DeLongchamps*, 1 Dall. (1 U. S.) 111, 116 (Oyer & Terminer Phila., 1784); *Penhallow* v. *Doane's Administrators*, 3 Dall. (3 U. S.) 54, 81 (1795).

The framers of the Constitution were well aware of the problems involved in the extraterritorial exercise of national sovereignty. Jay, in *The Federalist* No. 3 (Hamilton ed. 1873, p. 61), stated:

> "It is of high importance to the peace of America, that she observe the laws of nations towards all these powers [maritime nations]; and to me it appears evident, that this will be more perfectly and pune-

> tually done by one national government, than it could be either by thirteen separate states, or by three or four distinct confederacies."

See also, Hamilton, in *The Federalist No.* 80 (Hamilton ed. 1873, pp. 588-590).

This Court also has held that the law of nations is incorporated into the municipal law of the United States, to be applied as it comes in issue. *The Peterhoff*, 72 U. S. (5 Wall.) 28, 57 (1866).

In *The Scotia*, 81 U. S. (14 Wall.) 170, 187 (1871), this Court held that *The Scotia* was without fault in a collision in following the international rules of the road, and stated:

> "Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct."

See also, *Hilton* v. *Guyot*, 159 U. S. 113, 163 (1895), and *Banco Nacional De Cuba* v. *Sabbatino*, 193 F. Supp. 375 (S. D. N. Y. 1961), *affirmed* 307 F. 2d 845 (2d Cir. 1962).

International law as well as the constitutional law of the United States recognizes the limitations inherent in the concept of sovereignty. It is well recognized that one nation's attempt to regulate economic affairs which are more properly the concern of another nation is deemed an affront to the sovereignty of that other nation. In 1 Oppenheim, *International Law* (Lauterpacht ed. 1955), at p. 288 it is stated:

> "§ 125. The duty of every State itself to abstain, and to prevent its agents and, in certain cases, sub-

> jects, from committing any act which constitutes a violation of another State's independence or territorial or personal supremacy is correlative to the corresponding right possessed by other States. It is not feasible to enumerate all such actions as might constitute a violation of this duty. But it is useful to give some illustrative examples. Thus, in the absence of treaty provisions to the contrary, a State is not allowed to interfere in the management of their internal or international affairs, nor to prevent them from doing or to compel them to do certain acts in their domestic relations or international intercourse."

Accord, 1 Hyde, *International Law* 640 (1947); 1 Hackworth, *Digest of International Law* 51-52 (1940).

Since the Constitution was drawn against the background of the law of nations, it must be concluded that the limitations imposed by this law also limit the power of Congress to regulate economic relationships created and existing within another country.

This limitation has been well expressed in the analogous situation of the extraterritorial application of the Lanham Act, 15 U. S. C. §§1051 *et seq.* In *Brown* v. *Duchesne*, 19 How. (60 U. S.) 183, 195 (1856), the Court held that the use by a foreign ship in a port of the United States of a device patented in the United States was not a violation of the patent law:

> "The patent laws are authorized by that article in the Constitution which provides that Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. The power thus granted is domestic in its character, and necessarily confined within the limits of the United States. It confers no power on Congress to regulate commerce, or the vehicles of commerce, which belong to a

> foreign nation, and occasionally visit our ports in their commercial pursuits."

The constitutional question was raised and not decided in *Vanity Fair Mills, Inc.* v. *T. Eaton Co.*, 234 F. 2d 633 (2d Cir.), *cert. den.* 352 U. S. 871 (1956), at p. 644 in which the Court stated:

> "Here again, we think that these benefits are limited in application to within the United States. It is true that they are not expressly so limited, but it seems inconceivable that Congress meant by this language to extend to all eligible foreign nationals a remedy *in the United States against unfair competition occurring in their own countries.* Moreover, if §44 were so interpreted, it would apply to commerce which is beyond the Congressional power to regulate, and a serious constitutional question would be created."

Thus, Congress is without power to regulate labor-management relations aboard foreign flag vessels, at least when these vessels are beyond the territorial limits of the United States. By firmly settled principles of international law, universally respected by all nations long before the founding of this Republic, and to this day, the internal affairs of seagoing vessels may be regulated only by the laws of the flag state. The framers of the Constitution gave no power to Congress to override this basic principle of the law of nations.

B. Fifth Amendment to the United States Constitution.

Regulation by Congress of the contractual relationship created in Honduras between Empresa and its foreign employees aboard its foreign flag ships, would violate the provisions of the Fifth Amendment of the United States Constitution. The Fifth Amendment provides in part:

"No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

Attempts by individual states to extend their powers beyond their own borders have on numerous occasions been held repugnant to the due process clause of the Fourteenth Amendment. *Miller Bros. Co. v. Maryland*, 347 U. S. 340 (1954); *Hartford Acc. & Ind. Co. v. Delta & Pine Land Co.*, 292 U. S. 143 (1934); *Home Insurance Company v. Dick*, 281 U. S. 397 (1930).

This fundamental constitutional principle restricting the action of individual states applies *a fortiori* to the relationship between the United States and nationals of foreign countries. If it is violative of due process to permit a state to regulate persons and activities in other states within the United States, then it is violative of due process to permit the federal government to regulate persons and activities which have little or no relation to the United States. It is most imperative that these limitations be observed in the international realm because of the delicate questions of international law and relations which are raised by the extraterritorial application of domestic United States statutes to persons and activities located in foreign countries.

It is fundamentally unfair to subject private individuals to totally unexpected applications of law. Persons in Honduras do not contract with respect to the law of the United States any more than persons in Mexico contract with respect to the laws of Texas. Furthermore, even as Texas is subject to the overriding power of the Federal Constitution, the United States, as demonstrated above, must respect the rights and duties imposed by the Law of Nations. In light of these considerations, it is a denial of due process of law under the Fifth Amendment to regulate labor-management relations on these foreign vessels.

C. Section 2 of Article II of the United States Constitution.

Section 2 of Article II of the Constitution grants to the Executive Department the function and the power as the sole organ of the federal government in the field of international relations. *U. S.* v. *Curtiss-Wright Export Co.*, 299 U. S. 304, 319 (1936); *U. S.* v. *Belmont*, 301 U. S. 324 (1937); *U. S.* v. *Pink*, 315 U. S. 203 (1942).

The action proposed to be taken by the Board under the Decision and Direction of Election dated November 15, 1961 infringes upon the functions and powers exclusively granted to the Executive Department of the United States Government to conduct the foreign affairs of the United States by disregarding the requirements of the Honduran treaty, well settled principles of international law, and the expressed disapproval of the Department of State. (R. 85)

This interference with the policy of the Executive Department has already resulted in an official note of protest from His Excellency Celeo Davila, Ambassador from Honduras to the United States, to His Excellency Dean Rusk, Secretary of State of the United States, objecting "respectfully, but firmly" to the action taken by the Board in this matter. (Appendix C to this brief.)

POINT III.

The District Court had jurisdiction of this action and power to issue injunctive relief.

NMU's contention that the District Court lacked jurisdiction to entertain this suit is based upon a narrow and unwarranted construction of this Court's decision in *Leedom* v. *Kyne*, 358 U. S. 184 (1958). There is no need to repeat here the thorough discussion of the jurisdictional points made by Judge Friendly below (R. 64-70).

Basic jurisdiction of the action rested on 28 U. S. C. §1337, giving the District Court jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce . . ." without regard to the amount in controversy. The existence of this basic jurisdiction does not appear to be seriously challenged by NMU or the Board. Rather, the contention is that, with certain exceptions, Board orders in representation cases are not reviewable by the courts except as they may be drawn into question in unfair labor practice cases under Section 9(d) of the Act (NMU Br. pp. 15-21).

In the *Leedom* case this Court held that a District Court had jurisdiction to vacate a Board determination in a representation proceeding where the Board had exceeded its powers. The question decided was thus stated by Mr. Justice Whittaker:

> "The sole and narrow question presented is whether a Federal District Court has jurisdiction of an original suit to vacate that determination of the Board because made in excess of its powers." p. 185.

The holding of this Court in *Leedom* is fully applicable to the facts of this case. There the order of the Board deprived the petitioners of "rights assured to them by Congress." Here the Board's order deprived Empresa, a foreign corporation, its foreign workers and their union, of the right to be free of improper regulation by the Board. When the Board acted outside the "boundaries" of the Act as construed by this Court in *Benz*, it violated the statutory mandate as surely as though those boundaries were written into the statutory language.

The further contention by NMU that the District Court was open to a union but not to an employer is a distinction which has no foundation in the history of the Act, is not

made in the cases interpreting it and is not necessitated by any practical considerations. Judge Friendly correctly concluded that there is no rational basis for such a distinction (R. 69).[5]

Finally, NMU contends that the holding below created "an entirely new exception to the rule against independent suits in representation cases" (NMU Br. p. 17). Actually the holding is a logical application of this Court's decision in *Leedom*. In both cases, the Board acted beyond its powers and equitable relief thus became appropriate. Moreover, as Judge Friendly pointed out below, it is at least as important that the Board not exceed its jurisdiction in the delicate field of international relations as in purely domestic situations involving United States employers and United States employees.

Surely the orderly administration of justice requires that where an administrative agency has exceeded its delegated powers, and delicate relations with foreign nations are involved, the Federal courts should exercise their power to restrain illegal action by the agency before serious damage has been done to the foreign relations of the United States. In these circumstances to hold that the Federal courts are powerless to act until there has been a finding of an unfair labor practice and major damage to international relations has already occurred, would be contrary to the public interest and certainly was not intended by Congress.

A further basis for exercise of the injunctive powers of the District Court is Empresa's contention that its con-

[5] Judge Friendly pointed out that even in the *Leedom* case, the union could have precipitated an unfair labor practice charge. As a practical matter prompt District Court action in this situation does not cause greater delay than to defer court review. See 73 Harv. L. Rev. 84, 219-220 (1959).

stitutional rights would be violated by execution of the order complained of. Where an invasion of constitutional rights is asserted in a representation proceeding, and such claim is "not transparently frivolous", the courts have authority to act under *Fay* v. *Douds*, 172 F.2d 720 (2d Cir., 1949).

It follows that the District Court had jurisdiction to entertain this action and the issuance of appropriate injunctive relief to restrain the exercise of unauthorized action by the Board was proper.

Conclusion.

The determination made by the Court of Appeals was correct and should be affirmed. We respectfully submit, however, that affirmance should be grounded in the well settled principle that the law of the flag governs the internal affairs of seagoing vessels. Adoption of the "contacts" approach while requiring affirmance here will serve no useful purpose, either public or private, in the long run, and would inevitably lead to confusion, uncertainty and chaos in international trade and relations.

THE ORDER APPEALED FROM SHOULD BE AFFIRMED.

Respectfully submitted,

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November 19, 1962

Appendix A.

CONSTITUTION OF THE UNITED STATES

Article I

* * * * * * *

Section 8. The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, * * *.

Article II.

* * * * * * *

Section 2. [The President] * * * shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments * * *

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LABOR MANAGEMENT RELATIONS ACT, 1947

The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 72 Stat. 945, U. S. C. 151, *et seq.*)

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate current business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

* * * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal

Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * * *

SEC. 9 * * *

* * * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative define in subsection (a) of this section:

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * * *

(d) Whenever an order of the Board made pursuant to section [10(c)] of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (e) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section [10] of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * * *

SEC. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section [8] of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or trans-

acts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the poceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

TREATY

Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618:

ARTICLE 10:

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

. . . . . .

ARTICLE 22:

A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

. . . . . .

Appendix B.

The contents of this appendix are offered only if the Court should conclude that reference may be made by counsel to the transcript and exhibits before the Board, which were not before the courts below.

The brief filed by NMU contains a number of references to the record before the Board, as well as arguments not supported by that record and which were in fact rejected by the Board. For example, at pages 9-10, the NMU repeats arguments made before the Board to the effect that "more than 5%, and perhaps as many as 10%, of the unlicensed crew complement are either American citizens or resident aliens (SM 583, Empresa Ex. 25A-O)." It was shown to the satisfaction of the Board that none of the unlicensed seamen is an American and that with four possible exceptions all are non-residents. The complaint in this action so alleges (R. 4) and its allegations stand admitted on the record before the Court.

Again, NMU states (pages 9-10) that "from time to time unlicensed crew members are hired in the United States (SM 428, Empresa Ex. 15A-D). The plaintiff in *Zielinski* v. *Empresa Hondurena de Vapores*, 113 F. Supp. 93 (1953), was hired in the United States." The same contentions were made to the Board and it was shown that no unlicensed seaman was *ever* hired in the United States, e.g., SM 417-418, Empresa Exs. 9, 10, 11, 15A-D, 25A-O). The only "exceptions"—of which the crew list showed 4 instances—involved transfers of a seaman from one Empresa vessel to another Empresa vessel or repatriation of the seamen (SM 539-540). The Board so found (R. 14, fn. 15). The plaintiff in the *Zielinski* case was a third mate, not an unlicensed seaman.

In view of the Board findings, it is unnecessary to discuss other contentions by NMU which were in effect overruled by the Board. However, the following evidence before the Board may be deemed pertinent if that record is to be considered here:

1. Empresa was formed in 1941 as a wholly owned subsidiary of UFCO at the urging of the Honduran Government to develop a Honduran Merchant Marine (SM 78-79, 350).

Basically the Government of Honduras "... wanted a completely Honduran merchant marine" (SM 158). As Mr. Albert E. Carpenter, Comptroller of UFCO, testified:

> "For many years before Empresa was formed, a subsidiary of United Fruit Company [Mayan Shipping Corp.] had operated a great number of Honduran ships. However, the Honduran government were [sic] very anxious to have a true Honduran merchant marine. Under the prior operation there had been seamen of many, many nationalities. They wanted as nearly as possible to have Honduran seamen aboard their vessels, and with our vast interest in Honduras and the pressure that was brought to bear by the Honduran government, we felt it was in the best interest of the United Fruit Company parent and the Tela Railroad Company, who was operating in Honduras, to accede to the wishes of the Honduran government, and accordingly a Honduran corporation was formed which took over the Honduran flag ships and were manned practically entirely by Honduran seamen. (SM 78-79)."

The vessels acquired by Empresa in 1941 had, for many years before, been under the Honduran flag (SM 581; UFCO Ex. 14).

2. UFCO, the sole stockholder of Empresa, searches for the best qualified candidates in electing directors without regard to whether those chosen have served in the employ of UFCO or one of its subsidiaries (SM 393). Thus, qualified individuals who have never been in the employ of UFCO or any of its affiliates have been elected officers of Empresa (SM 398).

3. The principal office of Empresa from 1941 until 1955 was maintained in the Port of Tela, Department of Atlantida, Republic of Honduras (Empresa Ex. 1); in 1955 the main office of Empresa was removed to Puerto Cortes, Department of Cortes, Republic of Honduras, where said office has continuously been maintained to the present date (SM 373, 378-379). Empresa since 1958 has also maintained three offices in the U. S. which husband its vessels while in American ports (SM 559-560).

4. In 1958 alone, Empresa paid taxes estimated to be in excess of 1,000,000 Lempiras ($500,000) to the Republic of Honduras (Empresa Exs. 26, 26-A). During the period 1951 to 1959, Empresa paid 4,627,900 Lempiras in various taxes to Honduras (Empresa Ex. 26). Empresa also reports "to the Honduran government wages paid during the year to officers and crew of Empresa and Balboa vessels" (SM 443). No such reports (withholding tax, etc.) are made to the United States Government.

5. The time charters entered into between Empresa and UFCO, and Balboa and UFCO, are negotiated by representatives of the respective parties (SM 217-218). Time charter arrangements, rather than bare-boat charters, are entered into because the former are desirable from both the owner's and the charterer's point of view (SM 345). The charter rates paid Empresa for its vessels have generally been equal to or greater than that paid for comparable vessels for like duration (UFCO Ex. 11; compare Pet. Exs. 3-A, 3-B, 3-C with UFCO Ex. 13). The covenants, conditions and other terms of the charter parties of the Empresa and Balboa vessels are almost identical to the standard form for time charters used in the shipping industry (Compare Pet. Exs. 3-A, 3-B, 3-C with UFCO Ex. 13).

The time-chartering of a ship is the leasing of a fully manned and provisioned ship, ready to go to sea for a given period of time (SM 187-188). The owner (Empresa) has aboard its own Master, its own officers and its own seamen.

This crew is responsible to the owner, and only the owner has the right to hire, fire, or in any way exercise control over them. Only the owner, as employer, is responsible for "internal management" of his ship, covering all things from collective bargaining to the food put out by the ship's galley (SM 182). Empresa performs all functions normally performed by an employer with respect to the crew serving on its fleet. In line with standard time-chartering procedure, UFCO does not ". . . exercise any direction or any control over the labor relations and personnel policies of the vessels that are time chartered by Empresa to the United Fruit Company" (SM 196-197).

6. Each vessel owned or operated by Empresa calls regularly at Honduran ports. The number of calls per year in 1959 ranged from 2 to 24 calls per vessel. Such has been the case consistently since Empresa's formation in 1941 (SM 570-571). During their stay in Honduran ports, Empresa vessels may spend many days at a time in this country (SM 284). These ships spend at least as much time in Honduras as they do in United States ports (SM 284), and the seamen take their vacations in Honduras "where they have families" (SM 430). The majority of the time spent by ships and seamen is spent on the high seas.

7. Without exception, each unlicensed seaman employed by Empresa on the vessels owned or operated by it has been a non-resident alien of the United States at the time he was initially hired (SM 418-419). Again without exception, every unlicensed seaman employed by Empresa was hired in Honduras and in no other place in the world (SM 418). To gain employment with Empresa, an unlicensed seaman is required to file an application at Empresa's principal office in Puerto Cortes (SM 419). Personnel cards reflecting the employment record of each unlicensed seaman in Empresa's employ are maintained in Puerto Cortes (SM 425). These cards reflect disciplinary action taken against the seamen by Empresa (SM

542-545), as well as transfers between vessels (SM 539), promotions (SM 538) and demotions (SM 545). (Emp. Ex. 15-A, 15-D). They also show that when the Ship's Articles indicate that an unlicensed seaman signed on or signed off at a port other than a Honduran port, such signing on or off resulted either from the seaman being transferred from another Empresa-owned or operated vessel, or from the seaman being repatriated (SM 540).

8. The salaries and wages of the unlicensed seamen, as well as all officers and other employees of Empresa, are paid by Empresa with funds of Empresa (SM 434-435). Moreover the labor relations and personnel offices of the two corporations are completely distinct. The Personnel and Labor Bureau of the United Fruit Company deals solely with the problems of that company (SM 56-57) whereas entirely separate and independent employees and attorneys of Empresa handle the personnel and labor relations issues of that company (SM 374, 432-433, 435, Empresa Exs. 17-20).

9. The owners of the approximately 8,700,000 shares of stock in UFCO live in more than 30 countries (SM 49-50).

Appendix C.

No. 109

November 29, 1961.

His Excellency
DEAN RUSK,
The Secretary of State,
WASHINGTON, D. C.

Excellency:

With special instructions of my Government, I have the honor to call Your Excellency's attention to the decision rendered by the National Labor Relations Board, an Agency of the Government of the United States of America, in the city of Washington, in the case No. 2-RC-10379, entitled "United Fruit Company and National Maritime Union of America, AFL-CIO," dated November 15, 1961.

In this case the National Maritime Union of America, an American labor organization operating in this country, filed a petition with the National Labor Relations Board, with the final purpose to represent the unlicensed seamen working on vessels owned and operated by "Empresa Hondureña de Vapores, S. A.", a Honduran corporation recognized by Decree No. 1383 issued by the Ministry of Interior, Justice, Sanitation and Public Welfare of Honduras, on March 28, 1941, with principal office at Puerto Cortés, Republic of Honduras. The National Labor Relations Board decided favorable the petition of said Union.

My Government has taken notice of this decision with very great concern, because the Board has paid no consideration to the fact that all those vessels fly the Honduran flag and are registered in the Honduran registry, and has also ignored the Treaty of Friendship, Commerce and Consular Rights between Honduras and United States, signed at Tegucigalpa, Honduras, on December 7, 1927.

Article X of the Treaty provides that merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

The National Labor Relations Board by asserting jurisdiction over the Honduran seamen aboard vessels carrying the Honduran flag has violated this provision that considers as vessels of Honduras those flying its flag.

It has also violated Article XXII of said Treaty which reads in part: "A Consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in case, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit".

The Articles X and XXII of said Treaty are very clear and there is no doubt that wages and contracts are matters dealing with internal order of the vessels, and are therefore subject exclusively to the laws of the State of registry and flag.

This decision has also ignored the following facts that were alleged during the proceeding: that the seamen employed by the Empresa Hondureña de Vapores, S. A., on its vessels are Honduran nationals and citizens of Honduras, hired in Honduras, with domicile in that country; that the seamen and the other employees of Empresa Hondureña de Vapores are subject to the laws of Honduras, and under the jurisdiction of the Honduras labor authorities; that the vessels owned and operated by Empresa Hondureña de Vapores, S. A., as well as their crews are subject to the Merchant Marine Law of Honduras; that those ves-

sels regularly carry tonnage to and from Honduras and that said Empresa according to Honduras law is required to pay substantial income and other taxes to Honduras; that said Empresa Hondureña de Vapores, S. A., is the sole employer of the unlicensed seamen working on its vessels and that the United Fruit Company, an American Corporation, has nothing to do in negociating collective bargaining with Sociedad de Marineros de Honduras, a labor union representing the unlicensed seamen; that the United Fruit Company has nothing to do with the firing, promotions, assignment, discipline and other elements of control over the seamen; and that for 19 years since the inception of Empresa Hondureña de Vapores, S. A., in 1941, said Empresa has necotiated every collective bargaining agreement with the Honduran union, including the labor contract presently in existence.

I want to inform your Excelleney the Secretary of State that according to the Labor Law of Honduras "Código de Trabajo de Honduras", Honduras has exclusive jurisdiction over the relations of employers and employees working in its territory and in its ships flying its flag. This jurisdiction can not be renounced and the Honduras Government can never accept that a foreign Union like the National Maritime Union of America or any other represent the seamen of Honduras that work on vessels of Honduran flag. According to our Labor Laws those seamen are represented by a Honduras Union properly established in that country and regulated by the National Labor Laws.

It is a well established principle of International Law that a vessel is subject exclusively to the law of the State of registry and whose flag it flies regardless of ownership and accordingly a domestic statute should never be construed to violate binding and effective principles of international law.

It is a fact that the American labor laws has been construed so as to limit its application to seamen on American flag vessels over which Congressional power is undoubted.

International Law recognizes that every State determines the nationality of vessels flying its flag through its domestic registration laws and that registration of vessels of foreign ownership may be permitted, and International Law recognizes the flag and registry of such vessels with the same force as that of any other vessel of the same flag and registry.

It also recognized that a vessel on the high seas and in a foreign port is subject to the exclusive jurisdiction of the State of registry apart from powers not relevant here, that every State has over foreign vessels in its waters.

I am perfectly aware that His Excellency the Secretary of State is well acquainted with all these principles, nevertheless I consider that in this occasion I should point out said principles.

In view of the above considerations, and on behalf of my Government, with much regret, I want to protest, respectfully, but firmly against said decision of the National Labor Relations Board.

In taking this action, my Government, knowing that Your Excellency's Government is so deeply interested in the fulfilment of the international treaties, hopes that Your Excellency will take the appropriate measures to remedy this situation.

I avail myself of this opportunity to renew to Your Excellency, the assurances of my highest consideration.

CELEO DAVILA
Ambassador of Honduras.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 107

FRANK W. McCULLOCH, [illegible] PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, GERALD A. BROWN, [illegible]

Petitioners,

v.

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL., *Respondents.*

BRIEF FOR RESPONDENT

[illegible]

[illegible]

[illegible]

Counsel for Respondent

[illegible]

Washington, D. C.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 107

FRANK W. McCULLOCH, CHAIRMAN, AND PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, AND GERALD A. BROWN, MEMBERS, NATIONAL LABOR RELATIONS BOARD, *Petitioners*,

v.

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL., *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the District Court (R. 51-67) is reported at 201 F. Supp. 82. The National Labor Relations Board's (Board) Decision and Direction of Election which are the subject of this suit (R. 31-41) are reported at 134 NLRB No. 25.

Jurisdiction

The final judgment of the District Court was entered on March 6, 1962 (R. 76-77), and an appeal therefrom was docketed in the United States Court of Appeals for the District of Columbia Circuit on April 9, 1962 (R. 80). A Writ of Certiorari was granted by this Court on June 11, 1962 (R. 82; 370 U.S. 915). The jurisdiction of this Court is founded on 28 U.S.C. 1254(1). *Leedom* v. *Kyne*, 358 U.S. 184 upholds jurisdiction in this case.

Statutes, Treaty, and Constitutional Provisions Involved

Provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 72 Stat. 945, 29 U.S.C. 151, et seq. (NLRA) set forth in the appendix of the Board's brief. Relevant provisions of the Treaty of Friendship, Commerce, and Consular Rights between the United States and the Republic of Honduras, dated December 7, 1927, 45 Stat. 2618 are quoted where cited in the text of this Brief. The Constitution of the United States; Section 8, Article I; Section 2, Article II; Article VI; and the Fifth Amendment.

Question Presented

Whether the NLRA grants the Board authority to order an election for the designation of a representative union for the purposes of collective bargaining on a Honduran flag vessel in derogation of the laws of Honduras, a treaty between the United States and Honduras, and international law and comity.

Statement

The District Court has permanently enjoined the Board from conducting an election for the designation of a representative for collective bargaining purposes among the

crewmen members of the Respondent Union, Sociedad Nacional de Marineros de Honduras (Sociedad), who man the Honduran registered ships of Empresa Hondurena de Vapores, S.A. (Empresa). The Board appealed this judgment but after the appeal was docketed therein, it petitioned and was granted a writ of certiorari to the Court of Appeals for the District of Columbia Circuit before hearing and judgment.

Sociedad is a labor union of unlicensed seamen organized over twenty years ago under the laws of the Republic of Honduras with offices in Puerto Cortes, Department of Cortes, Honduras.[1] It has obtained legal status to operate as a labor union because it has met the requirements of the Honduran Labor Code. It has been granted juridic personality under the authority and approval of the Honduran Labor Ministry which is required for a collective bargaining agent.[2] Its by-laws were submitted to the Minister of Labor for the required approval before they became operative.[3] Its managing officers are all Honduran citizens and possess the other special qualifications required by Honduran law.[4] Over 90 percent of its members, as Honduran law requires, are Honduran citizens.[5]

Sociedad has approximately 335 members who are all citizens of the Republic of Honduras with the exception of one member who is a Jamaican citizen. All but possibly four are residents of the Republic of Honduras. None of

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[1] The facts set forth herein unless otherwise indicated are taken from the Complaint and affidavits (R. 1-45).

[2] Honduran Labor Code at § 490. A translation of this Code is set forth in full text in the Brief *Amicus Curiae* of Republic of Honduras filed herein.

[3] Id., §§ 481, 483, 487, 488.

[4] Id., §§ 504, 510-513, 489.

[5] Id., §§ 475, 504.

the members or officers of Sociedad are citizens of the United States.

Under a collective bargaining agreement signed in the Republic of Honduras, pursuant to Honduran law, Sociedad furnished seamen to Empresa which owns and operates ten of its own merchant vessels and operates three others owned by Balboa Shipping Company, Inc., a Panamanian Corporation. Under time charter to United Fruit Company, these vessels make voyages and carry freight between Central and South American ports, as well as between Central and South American ports and ports of Canada, the United States and Europe. The vessels carry general cargo for shippers and consignees other than United Fruit, though the chief cargo is for the latter. The vessels also carry some passengers. All these vessels are registered under the laws of Honduras, have Puerto Cortes, or Tela, Honduras as their home port, and fly the flag of Honduras.

The seamen members of Sociedad are all employed in Honduras by Empresa under shipping articles executed in Honduras.

Collective bargaining agreements between Sociedad and Empresa have been in effect since 1942. Since Sociedad is the only Honduran union which the seamen employees of Empresa have chosen to join, Sociedad is their only collective bargaining agent.[6] The current contract between the union and Empresa is in effect until April 15, 1963.

The employer Empresa is an Honduran corporation, all the stock of which is owned by United Fruit Company, a

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[6] § 474 of the Honduran Labor Code prohibits a collective bargaining contract which makes membership in a union a condition for beginning or continuing employment. NMU's ignorance of this provision is demonstrated in its misconstruing of Sociedad's statement that it is the sole union recognized by the Honduran Government (R. 2) to mean that Honduran law requires exclusive recognition of Sociedad. (NMU Brief, 33).

corporation organized under the laws of New Jersey. Since the formation of Empresa in 1941, all of its officers and directors have resided in Honduras, and none of its officers or directors are employed by, or associated with United Fruit Company. At no time has Sociedad acted as a bargaining representative of employees of United Fruit Company. Nor has that Company ever participated in collective bargaining with Sociedad.

As the bargaining representative of Empresa's seamen, Sociedad and its members are forbidden by the Honduran Labor Code, from taking part in any activity which would have the effect of denying the authority and jurisdiction of the Honduran Government to regulate its labor relations.[7] The Government of Honduras advised the employer, Empresa, in a ruling dated December 8, 1961, that it regarded the action of the Board, in attempting to assume jurisdiction over Empresa and its unlicensed seamen and in directing an election of a union bargaining representative, as a violation of the sovereignty of Honduras, and null and void under its Constitution and laws (R. 24-30).

The Board's order dated November 15, 1961, in directing an election to be held for a union representative of the seamen employed by Empresa, upheld a petition of the National Maritime Union of America, AFL-CIO (NMU). The Board directed the holding of this election to determine whether the representation should be by NMU, another union known as Sindimar,[8] or by neither. To its order, the Board issued a Supplemental Notice providing:

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[7] §§ 469, 499(f), 500. The Constitution of the Republic of Honduras, Chapter II, Articles 116, 122, 132, declares that in enterprises of national interest, specifying the merchant marine, it is prohibited to renounce the rights and obligations imposed by law on those operating such enterprises. A translation of these provisions of the Constitution appears in the brief *Amicus Curiae* filed herein by the Government of Honduras.

[8] Twenty-two days after the Board's order herein which included an Honduran union, Sindimar, the Honduran Ministry of Labor handed down

"MAIL BALLOTING: All eligible seamen aboard Employers' ships which *do not* dock in ports of the United States between DECEMBER 17, 1961 and JANUARY 31, 1962, will vote by Mail Ballot, which will be mailed on JANUARY 15, 1962. *The deadline for return of Mail Ballots will be the close of business February 15, 1962.*

"COUNT OF BALLOTS: At the office of the National Labor Relations Board, 745 Fifth Avenue, New York, New York, on FEBRUARY 15, 1962, at 5:30 PM."

On November 29, 1961, the Government of Honduras, in an official Note to the Government of the United States (R. 42-45) protested the action of the Board as a violation of the Treaty of Friendship, Commerce and Consular Rights existing between the two nations since 1927 and of established principles of international law. It further specified that the assertion of Board jurisdiction over seamen on Honduran registered vessels was an intrusion into the internal order of the ships governed by Honduran labor laws; and requested remedial action by the United States.

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a ruling declaring that the effect of Honduran law is to forbid an Honduran union, or seamen aboard Honduran flag vessels from coming under the authority or power of a foreign agency, with respect to labor matters (Dec. 8, 1961). Eight days later, the injunction granted by the District Court herein stopped further activity in this case by the petitioning unions. That Sindimar presumably intends to abide by Honduran law made certain by the Labor Ministry's ruling is evidenced by the fact that since the injunction, Sindimar has not become a party to this appeal.

Just at the time when Sindimar was included in the election order in this case, the Board dismissed Sindimar as a union eligible for election in another case, *Hamilton Bros.*, 133 NLRB No. 85, saying: "The Board has been administratively advised that the Petitioner does not have an adequate showing of interest in the unit found appropriate and has requested permission to withdraw its Petitions for Certification of Representatives previously filed herein, and that the Employer has no objection to the withdrawal." In his dissent in *Hamilton Bros.*, Board Member Rodgers pointed out that Sindimar has never had a collective bargaining contract and that there was real doubt as whether it had any active members, or the kind of supervisory employees not permitted by the NLRA in an American union.

Subsequent to the filing of the Complaint by Sociedad in response to the District Court's request for the views of the Department of State on the Honduran Note, the Department of Justice advised the Court on January 10, 1962:

> "The Department of State informs me that, although the Department does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case." (R. 50).

The Respondent, Sociedad, was not a party to the National Labor Relations Board proceedings, and did not and could not participate therein because under the Honduran Labor Code it was forbidden to take part in any activity which would have the effect of denying the exclusive jurisdiction of the Honduran labor authorities.[9] Sociedad was not included in the Board's order as a union for which Empresa employees might vote as their representative.

The District Court held that the Board lacks jurisdiction to issue the Decision and Direction of Election at issue herein on the ground that the National Labor Relations Act confers no power upon the Board over foreign crewmen on foreign flag vessels. (201 F. Supp. 82).

Summary of Argument

I

A. On the high seas, the Board's order replacing Honduran labor law with United States labor law aboard vessels flying the Honduran flag violates categorically the centuries old and universally adhered to international law of flag state sovereignty. This law provides that "ships on the high seas are subject exclusively to the jurisdiction of the

[9] *Supra*, note 7.

State whose flag they fly . . . the same in extent as its jurisdiction in its own territory." *The S.S. "Lotus"*, P.C.I.J., Ser. A, No. 10. This rule of law does not countenance a novel United States rule of "contacts," a self-determined self-interest theory, to accomplish nullification by the United States of Honduran authority over vessels of Honduran registry on the high seas. The functional purpose of this universal rule is to codify a regulatory scheme which prevents conflict among nations by providing rules which are universally known and certain in content and application. The fact that nations who have transgressed the rule have been held to account for their violations demonstrates its strength. The Board's order would unsettle and destroy long standing international relations and expectations built upon this rule of international law.

B. The Board's attempt to acquire extraterritorial power all over the world over Honduran seamen is not only an illegal but an empty gesture. International law has long asserted a monopoly of physical power and control as the sovereign right of the flag state over the management of its vessels on the high seas. The control and regulatory authority of the flag nation on the high seas is complete and covers everything on the vessel everywhere and all that can affect the vessel and those on it. As a practical matter the Board's order cannot be effective. The flag state, Honduras, has the absolute right to forbid totally and to punish the individuals who in any way implement the requirements of foreign authority aboard its flag vessels on the high seas. That Honduras intends to exercise its rights and enforce its comprehensive labor code and exclude all other regulatory authority aboard Honduran flag vessels is officially clear in the record herein.

C. The rule of international law of flag state sovereignty has received consistent, unfaltering and repeated expression

and adherence by the United States Government and this Court. To destroy the mutual respect among nations for the law of flag state sovereignty on the high seas would create tension, chaos, irreversible conflict and retaliatory measures. It would nullify one of the basic and most widely accepted and effective rules of law of universal application in the world community. The regulatory scheme based upon this rule is essential to the continued avoidance of turmoil in the ever growing field of sea commerce, where, as was said in *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147, "the possibilities of international discord are so evident and retaliative action so certain." Reaffirmance of the rule by this Court is clearly called for on the facts of this case, and in reason and in law.

II

In United States waters, the United States has adopted and followed the rule of international comity which provides for non-interference in the internal order of labor relations aboard foreign flag vessels—a rule also universally followed by other nations. The Board bases its claim of authority on the kind of interferences allowed by the "internal order doctrine." However, the interferences permitted by that doctrine are prohibited on the high seas and are allowed only in foreign ports. And in foreign ports the internal order doctrine has always proscribed interference in labor relations. The Board's untenable suggestion of dual sovereignty aboard the vessels of Honduras is so clearly unworkable and illegal as to fall by its mere assertion.

III

The Board's reliance upon the broad general language of the NLRA as supporting its assertion of authority is directly rejected by the decisions of this Court requiring

a specific congressional intent clearly expressed to accomplish any nullification of the international law of flag state sovereignty. *Lauritzen* v. *Larsen*, 345 U.S. 571, 578; *Benz*, *supra* at 147. The Board argues that the NLRA does not specifically preclude its application to replace flag state regulatory power and that this is sufficient warrant for the Board's order. This flies in the teeth of those decisions of this Court which restate long articulated rules of statutory construction—rules which Congress is well aware of and rules which undoubtedly guided the Congress in adopting and amending the NLRA. *Lauritzen*, *supra*, p. 581. The Board seeks escape from these rules and claims support for its order in a far-fetched assertion that congressional approval of the "freezing" clause of the Landrum-Griffin Amendment to the NLRA in 1959 with respect to monetary standards of jurisdiction gave the Board power to enter the order here in question. That the Board must reach out to such extraordinary lengths, and desperately attempt to warp congressional intent out of context, demonstrates how totally lacking in foundation is the Board's jurisdictional claim.

IV

A. The Board rests its "national contacts" theory on *Lauritzen* v. *Larsen*, 345 U.S. 571, where the issue in the case was "choice" of the tort "law by which it should be judged," i.e., United States, Cuban or Danish. *Id.* at 583, 590. That case thus involved a problem of international comity only. No displacement of continuous regulatory power of a foreign flag nation—a problem of conflict with international law—was involved as in the instant case. In articulating a "contacts" test for the comity application of domestic law in a maritime tort case, this Court did not approve "national contacts" as a test for the occupation

of the labor relations regulatory field in nullification of international law of flag state sovereignty.

B. Since contacts can be changed at the will of any vessel owner, the unstable foundation of any rule arrived at by adding up the "national contacts" in each case is obvious. The courts of any nation whose nationals could conjure up a contact or contacts would be constantly flooded with cases asking that they weigh the sufficiency of United States or other nations contacts and assert control aboard vessels under their country's labor laws. The difficulty of the contacts theory as a standard for application of regulatory power is nowhere better demonstrated than the differences in the evaluation of contacts between the Board and the Circuit Court of Appeals in the *Empresa* case. From a viewpoint of law and practice the contacts theory therefore offers no basis for an elimination of the international law of flag state sovereignty.

V

A. The Board's order violates the Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras which has been in effect since 1928. The Treaty requires full recognition of the sovereignty of each nation over vessels under their respective registry. Both nations have acknowledged this interpretation. Yet the Board insists on its own understanding, though it lacks any prior experience or expertise in foreign affairs. The Treaty obviously is intended to prevent such an interpretation limiting Honduran authority aboard Honduran flag vessels. There is no misunderstanding between the Government of the United States and the Government of Honduras as to the effect of the Board's order. The Executive Branch of the Government of the

United States rejects the Board's order as unlawful. That Branch under the United States system has exclusive power over foreign relations, and this Court gives great weight to its interpretation of treaty obligations. *Sullivan* v. *Kidd*, 254 U.S. 433, 442.

ARGUMENT

I

On the High Seas, the Board's Attempt to Extend the NLRA Aboard Honduras Flag Vessels Violates International Law.

The Board's unprecedented attempt to nullify the ancient rule of flag state sovereignty on the high seas and replace it with a novel United States rule of "contacts," a self-determined, self-interest theory, has no basis in experience, law or reason. The crux of this case lies in the clash of two governments' regulatory powers on the high seas. It is a collision caused by the Board's attempted extension of its authority aboard Honduran flag merchant vessels throughout the world. Under these circumstances history illuminates the sound basis for the world-wide regulatory scheme embodied in the law of flag state sovereignty. History demonstrates its impressive maturity, its acknowledged obligation, its functional utility, and the chaos and conflict which would be created by United States rejection of this law rule which codifies centuries of mankind's experience on the high seas. The District Court's decision supports the rule of flag state sovereignty. The Court of Appeals of New York in *Incres Steamship, Ltd.* v. *International Maritime Workers Union*, No. 33, and the United States Court of Appeals for the Second Circuit in *McLeod* v. *Empresa Hondurena de Vapores*, Nos. 91 and 93, both utilized the "contacts" theory in part as a basis for their respective decisions. Respondent Sociedad urges that, as the District Court found, the rule of

flag state sovereignty on the high seas is the correct foundation for a decision rejecting the Board's election order.

A. *The Board's Order Violates The International Law Of Flag State Sovereignty On The High Seas*

The Board's election order replaces Honduran labor law with United States labor law aboard Honduran merchant vessels flying the Honduran flag. This displacement is not only in United States waters but in all the seas and ports of the world where the Honduran vessels ply, including their home port in Honduras. This limitation imposed on Honduran authority over vessels of its flag and registry is a categorical violation of the principles of international law which specifically prohibits any nation other than that of the vessel's flag from exercising authority over its management on the high seas—beyond the jurisdiction of any nation's territorial waters.

This international law rule has been precisely declared by the Permanent Court of International Justice:

> "It is certainly true that—apart from certain special cases which are defined by international law—*vessels on the high seas are subject to no authority except that of the State whose flag they fly.* In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. . . . A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so. . . . It follows that what occurs on board a vessel on the high seas must be regarded as if it

occurred on the territory of the State whose flag the ship flys."[10] (Emphasis supplied.)

The Permanent Court of International Justice summarized its determination of this principle of international law:

> "[I]t is no doubt true that all or nearly all writers teach that ships on the high seas are subject exclusively to the jurisdiction of the State whose flag they fly . . . which is equivalent to saying that the jurisdiction of a State over vessels on the high seas is the same in extent as its jurisdiction in its own territory."[11]

In practicing this rule all nations recognize that while the vessel is on the high seas only the flag nation may command, forbid, and punish the personnel on board and that the flag State is the only sovereign authority which may stop the vessel, or order its navigation, or direct its conduct in any matter to suit its purposes.[12] On the high seas, the flag State continues to control its vessel's total operations, both internal and external just as if it were within the national waters of its home port of registry. The flag State is the only State which possesses a monopoly of physical coercion and moral authority to maintain order aboard a

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[10] *The S. S. "Lotus"* P.C.I.J., Ser A., No. 10, (1927) reported in 2 Hudson, WORLD COURT REPORTS, 20, at 40.

[11] Id., p. 41. Even the dissents in this case are emphatic in their acknowledgments of this explicit principle of international law. Justice Loder, id., at 50; Justice Weiss, Id., at 54; Justice Nyholm, I.d., at 64; and Justice John Bassett Moore, the American member of the Court, Id., at 68, declared that: "It is universally admitted that a ship on the high seas is, for jurisdiction purposes, to be considered as a part of the territory of the country to which it belongs."

[12] For instance, before the declaration of the United States Naval Blockade of weapons to Cuba on October 22, 1962 the President of Honduras issued an executive order absolutely forbidding merchant vessels under the registry and flag of Honduras to enter Cuban ports and engage in any commerce with that country. Decree No. 1058. Tegucigalpa, D. C., 18 October 1962.

vessel while it is on the high seas. It is this exclusive sovereign power of a particular State which the flag signifies over a vessel on the high seas and which the Board's order attempts to deny to Honduras.

The assertion of United States labor laws aboard these foreign flag vessels on the high seas is necessarily a denial and derogation of the sovereign power of the flag State to apply its laws and regulate labor relations aboard Honduran flag ships.[13] Consequently, international law forbids a nation foreign to the flag of a merchant vessel to extend its laws and regulations to the conduct and relationship of employment among the officers and crew aboard the vessel while it is on the high seas. As a specific example, the Board's order requiring an election to be conducted on the high seas, and the return of ballots therefrom (*supra*, pp. 5-6) is an unquestionable violation of this international law.

The principle that the laws of a vessel's flag state shall control aboard the vessel while it is on the high seas, is the law of maritime operation which has existed from time immemorial. "From the beginning there seems to have been exercised extensive jurisdiction by the maritime Powers over their seamen, over their sea-borne commerce, over the ships flying the state flag, and over the relations, business and personal, between merchants and seamen. The Maritime Laws of Rhodes are the earliest laws of this sort record of which has been preserved."[14] Down to

[13] Even the assertion of a condominium of the labor laws of two sovereigns as the Board suggests in its Brief (p. 40) is a flagrant denial of the sovereign rights of the flag State over its vessels. As a practical matter, the enforcement of such a condominium within the confines of a single ship is unthinkable. Where dual state and Federal sovereignty has been urged, this Court rejected it as producing a "mischievous conflict." *Bethlehem Steel Co. v. New York Board*, 330 U.S. 767, 776, and "fraught with potential conflict," *La Crosse Tel. Corp. v. Wisconsin Board*, 336 U.S. 18, 25.

[14] Fenn, *Justinian and the Freedom of the Sea* (1925) 19 Am. Jour. Int. Law, 716, 717. "In considering the doctrine of the Justinian Law Books and the freedom of the sea, the first thing of importance which appears is

the Middle Ages, claims for jurisdiction were largely based on personal and family origin, and there was thereby, no condition for a legal conflict, nor any need for the legal assertion of the sovereignty of the flag State over its vessels on the high seas. When States began to justify their jurisdiction on a territorial basis, Bartolus of Saxoferrato who, in the 14th Century, first drew together our conflict of law principles, wrote that a hundred miles should be considered the limit of the territorial sea on which an adjacent State could exercise its jurisdiction, so that an offense committed in Pisan waters could be tried at Pisa.[15] As states began to exert their authority in terms of assertions of territorial jurisdiction, they naturally began to express their traditional exercise of full sovereignty over vessels flying their flags on the high seas as being the equivalent of the "territorial" rights of sovereign authority.

Hugo Grotius in 1625 wrote that although the sea was free, each nation acquired sovereign jurisdiction over waters which its vessels actually occupied and displaced.[16]

In 1758, Vattel described the principle of the sovereignty of the flag nation over its vessels on the open seas as an accepted, common and natural understanding among nations. He explained this sovereignty as being fully the equivalent of territorial jurisdiction. This clear principle of international law, Vattel declared, is not even disturbed

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that the earliest recorded statement in the form of law, that is, the text of Marcianus, preserved in D. 1.8 pr., and dating from the second century of the Christian era, does not signalize a break with the past. The states bordering the Mediterranean had been and continued to be accustomed to regulate and control by law their navigation and seaborne commerce." *Ibid.*, 725, 726.

[15] Cansacchi, L'Occupazione dei Mari Costieri (1936) 85. For a detailed history of sovereign authority limited to territorial waters see Fenn, *Origins of the Theory of Territorial Waters* (1926) 20 Am. Jour. Int. Law, 465, 475.

[16] Grotius, De Jure Belli ac Pacis, Book II, c. 3 § 13. Similarly, see Bynkershoek, De Dominio Maris, c. 3 (1702).

by the broad claims of dominion over the open seas, which were current in the dialogues of leading sea-power nations in his time:

> "For it is natural to consider the vessel of a nation a part of its territory, especially when they sail upon the free sea, as a State retains its jurisdiction over those vessels. And as, according to the commonly received custom, this jurisdiction is preserved over vessels, even over vessels in parts of the [high] sea subject to a foreign domination, all the children born in the vessels of a nation are considered as born in its territory." [17]

Modern international law jurists are even more precise in their assertion of the scope of this principle of flag sovereignty on the high seas:

> "States make certain rules for providing ships with their nationality, and authorizing them to fly their flags. There is, therefore, an intimate connection between the ship and the State whose nationality she acquires which carries with it the application to the ship of the laws of the flag-State. It is under these laws that the captain exercises his authority and enforces it. The ship may be a chattel, a piece of movable property, but it is governed by special laws and her independence, while on the high seas, from any control other than that of the flag-State, is universally recognized. It is not necessary to think of her as territory." [18]

[17] Vattel, Le Droit Des Gens, § 216.

[18] Higgins and Colombos, The International Law of the Sea (2nd rev. ed., 1952) 195.

This principle is explained—as it was in the *Lotus* case, *supra*—as a necessary corollary to the principle of the freedom of the seas. Herbert Briggs gives recent authority to the same effect:

> "Expressed in negative terms, writes Gilbert Gidel, the principle of 'the freedom of the seas' means that no State can exercise authority over any vessels on the high seas except those flying its own flag." [19]

The unquestioned character of this rule of international law is succinctly stated by Lauterpacht:

> "The following rules of the Law of Nations are universally recognised, namely: . . . that all vessels with their persons and goods are, whilst on the open sea, considered under the sway of the flag State; . . . These customary rules of International Law are, so to speak, supplemented by Municipal Laws of the maritime States comprising provisions . . . concerning discipline on board ship and the relations between the master, the crew, and the passengers . . ." [20]

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[19] Gidel, LE DROIT INTERNATIONAL DE LA MER, I (1932), 236, 125, referred to in Briggs, THE LAW OF NATIONS (2d ed., 1952), 329. Similarly in accord: I Hyde, INTERNATIONAL LAW CHIEFLY AS APPLIED AND INTERPRETED BY THE UNITED STATES (2d rev. ed., 1947), 752; Twiss, THE LAW OF NATIONS (2d ed., 1888), 292-93; I Westlake, INTERNATIONAL LAW (1910), 191; Schwarzenberger, INTERNATIONAL LAW (3rd ed., 1952), 56; Lawrence, PRINCIPLES OF INTERNATIONAL LAW (7th ed., 1923), 211; Starke, INTRODUCTION TO INTERNATIONAL LAW (4th ed., 1958), 209; Wilson, INTERNATIONAL LAW (3rd ed., 1939), 122; Rienow, THE TEST OF THE NATIONALITY OF A MERCHANT VESSEL (1937), 22; Higgins and Colombos, *supra*, Note 19 at 202; Smith, THE LAW AND CUSTOM OF THE SEA (3rd ed., 1959), p. 61; Fenwick, INTERNATIONAL LAW (3rd ed., 1948), 311.

[20] I OPPENHEIM'S INTERNATIONAL LAW (8th ed., Lauterpacht, 1955), 590-591.

The Board's scuttling of these hundreds of years of regulatory experience which has been codified into a consensus of legal obligations on the high seas in the delicate field of international law and relations would create utter confusion where expectation of order now prevails. Implementation of the Board's order would create doubt as to which law of the flag State would apply on vessels and which United States' law would apply aboard foreign flag vessels. And there is no universally accepted forum to resolve such conflict. The Board's argument (Brief, p. 52, et seq.) that its assumption of jurisdiction would not unsettle international relations in the light of these settled principles of international law, cannot be based on experience in foreign affairs or on reason and should be rejected by this Court.

B. *The Exceptions Confirm The Law of The Flag State Sovereignty And Demonstrate Its Universal Acceptance*

Nowhere is the international law principle of the sovereignty of a flag State over its vessels on the high seas more clearly defined as a universal proposition of mutual obligation and acceptance than in the exceptions to this law which have been very carefully circumscribed. And these exceptions reinforce Honduran jurisdiction over labor relations aboard vessels which fly its flag and repel the Board's attempt to impose its authority. Lauterpacht states that:

> "Although the freedom of the open sea, and the fact that vessels on the open sea remain under the jurisdiction of the flag State, exclude, as a rule, the exercise of the authority of any State over foreign vessels, certain exemptions exist in the interest of all maritime nations."[21]

[21] I OPPENHEIM'S INTERNATIONAL LAW (8th ed., Lauterpacht, 1955), § 266, p. 603.

He lists only four: (1) the right of belligerents to blockade the high seas around enemy ports, and to visit, search and seize neutral merchant vessels for the cartage of cargo destined to aid their enemies;[22] (2) the right which public vessels of all nations have to visit vessels on the high seas which are suspected of piracy and request them to show their flag and credentials; (3) the right of "hot pursuit" by a nation after a vessel on the high seas which has apparently violated one of its laws while within its territorial waters, provided that the pursuit has been continuous and unbroken; and (4) international law grants the cruisers of every State the right to accost, arrest, and seize any foreign vessel sailing under its flag without authority.[23]

Explaining these same careful exceptions, Messrs. Higgins and Colombos in their extensive treatise on THE INTERNATIONAL LAW OF THE SEA, emphasized again:

> "When no such general interests [exceptions cited above] are involved, merchant vessels on the high seas remain exclusively under the administration, the criminal, the civil and the protective jurisdiction of their flag State. . . . The law of the flag is thus applicable to all

[22] In 1752, King Frederick of Prussia noted in a *Promemoria* to the British Government that the British action in confiscating cargo and taking control of vessels flying its flag on the high seas clashed with its sovereign rights which pertained to such vessels. The Prussian *Exposition des Motifs* argued that "the Prussian vessels, although laden with property belonging to the enemies of England, were a neutral place, whence it follows that it is exactly the same thing as their taking such property out of the said vessels as to have taken it upon neutral territory." The answer of the British Government did not deny the Prussian assertion of sovereign rights over its flag vessels on the high seas. It argued that under international law of the sea, an exception has always been made to the respect due to flag sovereignty in permitting belligerents to accost and board and search all merchant vessels to determine whether they were carrying contraband cargo beneficial to their enemies. de Martens, CAUSES CÉLEBRES DU DROIT DES GENS, Vol. II, pp. 99-168.

[23] I OPPENHEIM'S INTERNATIONAL LAW (8th ed., Lauterpacht, 1955), § 266, pp. 603-05.

events which take place in the ship and are capable of producing legal effects."[24]

These are the only exceptions to the rule of international law which guarantees the sovereignty of the flag State over its vessels on the high seas. Other exceptions are only apparent, not real. The exercise of jurisdiction by nations other than the flag State on such matters in their courts as tort claims, property rights, and crimes involving their nationals aboard foreign flag ships on the high seas are merely assertions of jurisdiction which are not forbidden by international law over events that have occurred within the territorial boundaries of the foreign flag country. These acts of jurisdiction do not displace the authority of a sovereign to act similarly within its own jurisdiction. International law only forbids such foreign intervention within vessels of a flag State on the high seas as is forbidden within the boundaries of the flag State itself.

C. *The United States Government Has Always Adhered To the Law of Flag State Sovereignty*

It has been the traditional practice of the United States to acknowledge fully this principle of international law of flag State sovereignty on the high seas. In the year 1812, the United States was a small nation, but it fought an all-out war with Great Britian precisely in support of this principle of international law.[25] The British Government had adopted the practice of accosting merchant ves-

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[24] Higgins and Colombos, THE INTERNATIONAL LAW OF THE SEA (2 rev. ed., 1952), p. 202.

[25] See Message of President Madison recommending to Congress a Declaration of War, ANNALS OF CONGRESS, 12th Cong., Vol. 1, cols. 1624-1671, June 1, 1812. See Burt, THE UNITED STATES, GREAT BRITAIN, AND BRITISH NORTH AMERICA FROM THE REVOLUTION TO THE ESTABLISHMENT OF PEACE AFTER THE WAR OF 1812 (1940), pp. 305-16. See also Adams, HISTORY OF THE UNITED STATES OF AMERICA (1891), Vol. III, pp. 94, ff.

sels flying the flag of the United States on the high seas and searching them for seamen who appeared to be of British nationality and descent, and removing such seamen from the vessel.[26] Britain claimed its conduct was a proper exception to this international law principle in that they were exercising the right of a belligerent at war (with France) to search neutral vessels for contraband goods. They asserted that they were only looking for sailors of British descent who appeared to be under a current obligation to the British Navy. But such an assertion was not supported by the carefully circumscribed exception of belligerent rights to intervene in foreign flag sovereignty on the high seas.[27]

In that war, the United States succeeded in forcefully proclaiming its rights under this principle of international

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[26] Bemis has written that "submission to impressment marked the nadir of national disgrace in the history of American diplomacy." A DIPLOMATIC HISTORY OF THE UNITED STATES (4th ed., 1955), p. 146. And Mahan aptly remarked "the nation which endured [the impressment], content with reams of argument instead of blow for blow, had sunk beneath contempt as an inferior race to be cowed and handled without gloves by those who felt themselves the master." SEA POWER IN ITS RELATION TO THE WAR OF 1812. (1st ed., 1905) Vol. 1, pp. 114-128.

[27] The War ended when the British desisted in 1815 from this infringment of American flag State sovereignty on the high seas. But it was not until 1858 that the British expressed their abandonment of this interference as a right of a maritime power. In commenting on this renunciation, Lord Malmesbury was reported in The London Times, on June 18, 1858, to have explained in the House of Lords that: "He admitted the international law as laid down by the American Minister for foreign affairs, though not, of course, without being fortified by the opinions of the law officers of the Crown." (H. Ex. Doc. 7, 36 Cong., 2d Sess., 104, 105). Lord Lyndhurst also stated in the House of Lords on July 26, 1858 that: "Many persons . . . appear to think that . . . we have surrendered a most valuable and important right. The answer which I make to that is, that we have surrendered no right, for that, in point of fact, no right such as that which is contended for has ever existed. We have, my Lords, abandoned the assumption of a right, and in doing so we have, I think, acted justly, prudently and wisely." FUR SEAL ARBITRATION, Vol. XIII, 326-329.

law that the flag State has exclusive jurisdiction over merchant vessels on the high seas, and that it would not bow to even a momentary interference of even the greatest maritime power. In point of reality and principle, there is little difference between the British effort to impress American seamen on American merchant vessels on the high seas in 1812, and the attempt now of the Board to impress its jurisdiction on Honduran seamen abroad Honduran merchant vessels on the high seas. The United States is now the great maritime power. The Republic of Honduras, a small nation, protests now as the United States did in 1812.

Up to this moment, the assertion of this principle of international law of flag State sovereignty on the high seas has received consistent, unfaltering and repeated expression by the United States Government. Every period of its history is replete with examples of unhesitating assertions. In 1842, the Secretary of State, Daniel Webster, sent a note to the British Minister, Lord Ashburton, which fully reviewed this principle of international law and declared the official position of the United State Government:

> "A vessel on the high seas beyond the distance of a marine league from the shore, is regarded as part of the territory of the nation to which she belongs and subjected exclusively to the jurisdiction of that nation."[28]

In 1879, Secretary of State Evarts, wrote to Mr. Walsh, Minister of England:

> "No principle of public law is better understood nor more universally recognized than that merchant

[28] Mr. Webster, Secretary of State, to Lord Ashburton, British Min., August 1, 1842. WEBSTER'S WORKS, Vol. 6, 303. Cited and approved in *United States v. Rodgers*, 150 U.S. 249, 264.

> vessels on the high seas are under the jurisdiction of the nation to which they belong . . . a part of the territory of the nation to which she belongs." [29]

Similarly, the Department of State, declared in a memorandum dated 1906:

> ". . . International law limits the sovereignty of a country to three miles from low-water mark, and although Mexican sovereignty follows Mexican vessels upon the high seas until they put into a foreign port, international law does not recognize Mexican sovereignty over a foreign vessel, or any right on the part of Mexico *to assume the incidents of sovereignty* upon a foreign vessel, beyond the three mile limit." [30] (Emphasis added.)

In 1922, Secretary of State Hughes stated that the United States Government is prohibited by international law from extending its domestic legislation on board vessels of foreign flags beyond American territorial waters:

> "I am constrained to say, however, that I consider that any attempt on the part of this Government to extend its domestic legislation to the high seas . . . would be in contravention of an established rule of international law and practice.
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> "Although a nation may give effect to its laws, with regard to its own vessels wherever they may be navigated, in my opinion the long-observed rule with regard

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[29] Mr. Evarts, Secretary of State, to Mr. Walsh, Minister to England, July 11, 1879, U. S. For. Rel. (1879), 435.

[30] The Opinion of the Solicitor of the Department of State, Oct. 2, 1906, Ms. Department of State, file 779/3.

> to the three-mile limit to territorial waters stands in the way of the application of domestic legislation over vessels of other nations beyond that limit."[31]

And in this very case the Department of State has reaffirmed this historical position.[32]

D. *Judicial Recognition Of The International Law Of Flag State Sovereignty*

Judicial recognition of flag State sovereignty over its vessels on the high seas has also received consistent and unqualified expression by this Court. In *United States* v. *Rodgers*, 150 U.S. 249, 264, this Court adopted the statement of Secretary of State Webster which simply paraphrased the words of Vattel: (*supra*, p. 17)

> "Speaking for the government of the United States, he [Sec. of State Webster] stated with great clearness and force the doctrine which is now recognized by all countries. He said: 'It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the state retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the [open] sea subject to foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations.'"

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[31] Letter of Secretary of State Hughes to Senator Sterling, August 16, 1922; Ms. Dept. of State, file 811.114/900.

[32] R. 50, and brief *Amicus Curiae* of the United States Government to the Board in this case. See *infra*, pp. 43, 51.

Then in *Maul* v. *United States*, 274 U.S. 501, 511, this Court stated that:

> ". . . The high sea is common to all nations and foreign to none; and every nation having vessels there has power to regulate them and also to seize them for violation of its laws."

Mr. Justice Brandeis, in a concurring opinion in which Justice Holmes joined, also stated that:

> "There is no limitation upon the right of the sovereign to seize without a warrant vessels registered under its laws, similar to that imposed by the common law and the Constitution upon the arrest of persons and upon the seizure of 'papers and effects' . . ." (Id. at 524.)

While asserting the prerogatives of the United States under this rule of international law this Court has acknowledged respect for other nations rights of flag state sovereignty. It has held that a seizure by the United States of a foreign flag vessel on the high seas for a violation of United States municipal laws is invalid. Mr. Chief Justice Marshall in *Rose* v. *Himely*, 4 Cranch 241, 279.[33]

The highest courts of Great Britain and other nations have been equally clear in their acknowledgment of flag State sovereignty on the high seas.

In 1868, Justice Blackburn declared:

> "There are a vast number of cases which decide that when a ship is sailing on the high seas, and bearing the flag of a particular nation, the ship forms part of that nation's country, and all persons on board of her may be considered as within the jurisdiction of that nation

[33] See also *The Antelope*, 10 Wheat. 66, 122, 123; The leading decision in the English Courts is *Le Louis*, 2 Dodson's Rep. 238.

whose flag is flying on the ship, in the same manner as if they were within the territory of that nation."[34]

Justice Blackburn then concluded his careful study:

"My present impression, however, is, that where a ship is sailing under a particular flag, the flag affords protection to all who sail under it, and the nation to which the flag belongs has a perfect right to legislate for all those on board . . ."[35]

E. *Beyond Its Violation Of International Law, It Is In Practice Impossible For The Board To Enforce Its Jurisdiction Aboard Honduran Vessels Beyond United States Waters.*

This attempt by the Board to extend and enforce United States labor laws aboard any foreign flag vessel on the open seas can unquestionably be defeated by the sovereign rights of Honduras, the flag State, under international law. The Government of Honduras has already by an enactment of law, and through the declarations of its Secretary of the Ministry of Labor and its Ambassador to the United States, announced its intention and present policy to exercise its sovereign authority through its own labor legislation aboard all vessels flying its flag.[36] Under these Honduran laws, it is illegal for any union not officially recognized by the Gov-

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[34] *Regina* v. *Anderson*, 1 L.R.C.C. Res. 161, 169 (1868).

[35] Id., at 170.

[36] See ruling of Honduran Secretary of the Ministry of Labor, R. 24, 29-30; Note dated November 29, 1961, from Ambassador of Honduras to Secretary of State (R. 42, 44). For a comprehensive description of Honduran Labor Laws see United States Department of Labor, Bureau of Labor Standards, Report No. 189 (1961), LABOR LAW AND PRACTICE IN HONDURAS. There the Labor Department official pointed out that the Honduran Labor Code "preempts many functions normally left to collective bargaining in the United States." p. 18.

ernment of Honduras to organize workers under its laws to aid such a movement.[37]

There is absolutely nothing the National Labor Relations Board can do to thwart acts of the Government of Honduras on the high seas, and this totally destroys the Board's ability to impress its jurisdiction aboard Honduran vessels. The United States Government would be clearly violating international law were it to attempt an interference. And in the usual case of such violation of flag State sovereignty on the high seas, the offending nation has been required by an international arbitration tribunal to give substantial sums in reparation and penalty to the offended nation. In rendering an award in favor of Great Britain against the United States for a violation of the law of flag State sovereignty on the high seas, an arbitration tribunal declared:

> "It is a fundamental principle of international maritime law that, except by special convention or in time of war, interference by a cruiser with a foreign vessel pursuing a lawful avocation on the high seas is unwarranted and illegal, and constitutes a violation of the sovereignty of the country whose flag the vessel flies." [38]

Mutual respect among nations for the sovereignty of the flag State is as much the *sine qua non* for peace and order on the expanses of the high seas, as such respect for sovereignty is the source of peace and order along the border of contiguous nations.

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[37] Honduran Labor Code, §§ 499 (f), 469.

[38] *The Jessie, The Thomas F. Bayard, and The Pescawha, Great Britain v. United States, Claims Arbitration*, 1921, NIELSEN'S REPORT, (1926), pp. 479-480.

II

In United States Waters Comity Requires Non-Interference in the Internal Management of Foreign Flag Vessels

Even though international law does *not* require that the United States refrain from interfering in the internal management of foreign flag vessels within United States waters, a universal practice of comity among nations has led it to exercise restraint. The practice of such comity has been consistently recognized by this Court and adhered to by the United States up to the time of the Board's order in this case. The classical statement of American practice was set forth in *Wildenhus' Case*.[39]

> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship in a general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require."

This Court has accordingly acknowledged that international comity permits foreign vessels to carry the regulatory

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[39] 120 U.S. 1, 12. In accord: *Lauritzen* v. *Larsen*, 345 U.S. 571, 585; *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100, 123.

labor laws of their flag with them while within United States national waters. This Court has said:

> ". . . Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, charter-party, and nationality; others follow the vessel wherever she goes, as a law of the flag, such as those which regulate the mutual relations of master and crew, and the power of the master to bind the ship or her owners . . ."[40]

The Republic of Honduras, throughout its history has similarly and consistently recognized this practice of international comity. The Republic has ratified and bound itself to the Bustamante Code of Private International Law adopted by the Sixth International Conference of American States (Habana 1928) which specifically affirms in Article 281 that:

> "The obligation of officers and seamen and the internal order of vessels are subject to the law of the flag."[41]

This Code has been ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Nicaragua, Panama, Peru and Venezuela.

This rule of comity whereby nations refrain from extending their labor regulations aboard foreign flag merchant vessels within their national waters, is universally adhered to even though nations have labor laws which literally cover every enterprise within their territorial seas. If the Board should succeed in extending its jurisdiction in this case, it would be the first instance where the Courts of a nation

[40] *National Steam Navigation Co., Ltd. v. Dorr, et al.*, 105 U.S. 24, 30.

[41] 86 L.N.T.S. 254 (1929), 4 Hudson, International Legislation (1931), 2283 at 2321. Article XXII of the U.S.-Honduras Treaty also confirms this practice of comity. See Honduran Note to Sec. of State, R. 43, District Court opinion, R. 60.

have approved such intervention. Comity, as practiced by all nations, has never admitted such an interference in the field of labor relations. In such fields as safety, crime, health and payment of accrued wages there has been enforced interference on board foreign flag vessels in local ports. This interference has not included the field of labor relations—the regulation of collective baragining.

So strict has been the United States adherence to this practice of not interfering with the internal management of a vessel, that when a question of a statute's application to foreign flag vessels within national waters is raised, the courts refuse to so apply it unless this is shown to be the clearly expressed intention of Congress. See *infra*, pp. 32-34. In the case of *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100, the Court applied the National Prohibition Act to foreign flag ships within national waters because it found that the statute specifically extended its reach to "the United States and all territories subject to the jurisdiction thereof." The Court felt compelled by the specification of the territorial reach of this Act to apply it to these vessels within the United States territorial waters. But in considering the similar applicability of the NLRA this Court found that its universal language did not show any indication or intent to have such a reach, and therefore the Court denied its applicability to foreign flag vessels within American national waters.[42]

In applying the comity principle of assessing contacts for choice of tort law to maritime injuries, the Court of Appeals of the Second Circuit has taken care to note that the comity principle practiced in "matters of 'internal management' are not involved in an action by a seaman to recover damages for injuries suffered through the negligence

[42] *Bonn* v. *Compagnia Naviera Hidalgo*, 353 U.S. 138, 147.

of a ship owner."[43] The comity standard for applying laws to the internal management of foreign flag vessels within a foreign port is totally different from that pertinent to maritime tort law.[44] This comity standard has never been and is not now conditioned on a consideration of "national contacts."

III

The Language of the NLRA and Its Legislative History Refute the Board's Claim of Power to Nullify International Law and Disrupt International Comity.

A. *The applicable canons of statutory construction require avoidance of conflict with international law and practice of international comity.*

The Board cannot dispute the fact that its order conflicts with international law which recognizes flag State sovereignty on the high seas and comity within national waters. This Court has held that such a conflict should be avoided unless Congress clearly and affirmatively expressed an intention to eradicate the particular international law rule in question. Congress in adopting the NLRA must be presumed to have acted with full knowledge of this canon of statutory construction which was established by this Court more than 150 years ago.

In 1804, Mr. Chief Justice Marshall said that, "[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."[45]

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[43] *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927, 929 (2nd Cir., 1932), cert. denied, 287 U.S. 642.

[44] *Lauritzen* v. *Larsen*, 345 U.S. 571.

[45] *The Charming Betsy* (U.S.) 2 Cranch 64, 118.

Over a hundred years later, Mr. Justice Day said in construing American tariff laws:

> "The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law." [46]

Forty years later, Mr. Justice Jackson said for this Court that the Jones Act by its terms applicable to "any seamen" could be said to literally cover every seaman in the world even "a hand on a Chinese junk, never outside Chinese waters." But the Court held the words of the Act were not intended to cover such foreign seamen and it would not be applied as the measure for recovery for injuries by a Danish seaman aboard a Danish flag vessel in Cuban waters just because he was hired in the United States. The Court said:

> "By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." [47]

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[46] *MacLeod* v. *United States*, 229 U.S. 416, 434.

[47] *Lauritzen* v. *Larsen*, 345 U.S. 571, 577. See also, 1 Hyde, *supra*, note 19, p. 727: "The scope of the operation of a domestic statute, in a geographical sense, or with respect to the nationality of individuals or the character of ships to which it is applicable is determined by the will of the legislator. In the endeavor to ascertain its design, there may be reason to impute to the legislative body knowledge of the law of nations and the absence of a deliberate attempt to defy its injunctions."

And in 1958 Mr. Justice Clark for this Court emphasized the vital importance of adhering to this particular doctrine of construction for the very statute, the NLRA, to which the Board points as its authority:

> "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."[48]

Since the Board cannot and does not claim to have found an affirmative intention of Congress clearly expressed to support its contentions, its order must fall before the principles of international law and comity with which it conflicts.

B. *The NLRA and its legislative history contain no clearly expressed intent to authorize this order to nullify international law of flag state sovereignty.*

The Board contends that the literal language of the NLRA covers disputes involving foreign flag vessels (Brief p. 22 *et seq.*) and that the fact that the Act's language does not preclude its application allows its application (Brief p. 36 *et seq.*)

While the language of the NLRA is general and without specific indication that it intends to contravene the international law of flag state sovereignty on the high seas, it must be noted that it is the custom of most legislatures in the world (the United States Congress as well as the

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[48] *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 147. Here serious constitutional questions are raised by the Board's interpretation of NLRA as authorizing its order (R. 5-6), making this a proper case for this Court to invoke the principle that where two constructions of a statute are possible the Court will adopt that construction of a statute which avoids questions of constitutionality. *Crowell* v. *Benson*, 285 U.S. 22, 62; *United States* v. *Wilkovich*, 353 U.S. 194, 202.

National Congress of Honduras) to write statutes governing labor relations in a general and generic language.[49] Such general language is commonly understood to cover all areas over which the nation actually exercises its sovereignty. So the legislative acts of both the United States and Honduras have been asserted over vessels flying their respective flags on the high seas. And it should be noted that in the two instances when the United States Congress departed from its use of universal language to legislate specifically as to labor matters between maritime employers and employees it specifically limited its legislative scope to American flag vessels and excluded vessels of foreign flags.

The language of the NLRA uses the customary literally universal terms in its definitions of the words "employer" and "employee" apart from specific exclusions which have no relevance here.[50] The term "labor organization" is defined with equal universality and has no exclusions.[51] Similarly, the Clayton Act of 1914, in limiting injunctive relief, also used the words "employer" and "employee" without limitations.[52] The definitions of the Labor-Management Reporting and Disclosure Act of 1959 continues the Congressional practice of writing definitions in universal terms into all labor legislation having only a domestic application.[53]

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[49] Honduran Labor Code §§ 4, 5.

[50] See. 2(2), (3), 29 U.S.C. § 152.

[51] See 2(5), 62 Stat. 137-138 (1948), 29 U.S.C. § 152(2), (3), (5).

[52] 38 Stat. 738 (1914), 29 U.S.C. § 52.

[53] See the definitions "Employer," "Employees," "Labor Disputes," and "Labor Organization" in P.L. 86-257, § 3.

The Board and Union also seek legislative sanction for the Board order in the words of the NLRA granting Board jurisdiction over matters "affecting foreign commerce." (Board Brief, pp. 22-23; NMU Brief, pp. 26-30.) This is obviously directed to the problem of a federal government in preempting jurisdiction over domestic enterprises engaged in foreign commerce from the jurisdiction of its various states. Even general language such as this when misapplied to indicate extraterritorial application will

Congress when it was specifically concerned with the application of its domestic labor regulations to seamen, showed itself conscious in this particular to impose limits expressly preventing labor legislation from extending to foreign flag ships. The Fair Labor Standards Act of 1938 defines "employer" as "any person" and "employee" as "any individual employed by an employer."[54] Under this Act all seamen, even American seamen, were exempted from the minimum wage and overtime pay provisions. When, under the Fair Labor Standards Amendments of 1961, Congress narrowed this exemption by extending a minimum wage to American seamen it specifically excluded foreign flag vessels and declared the Act only extended to American flag vessels. Section 3(p) of the Act, in the 1961 amendments, defines "American vessel" to mean precisely "any vessel which is documented or numbered under the laws of the United States."[55]

Similarly, when in the 1938 Amendments to the Merchant Marine Act of 1936 Congress turned its attention to specific labor problems of "maritime employers" and "maritime employees," it was as careful as it was in the Fair Labor Standards Act Amendments of 1961 to make these laws expressly inapplicable to "any vessel not documented, registered, licensed, or enrolled under laws of the United States."[56] This experience proves that when Congress has turned its specific attention to the labor problems of seamen it has specifically excluded foreign flag ships from the application of its legislation.

The experience here reviewed precludes any assumption

be construed to conform to international law which forbids displacement of another sovereign's authority within his own jurisdiction. Such literal language covers, for instance, a labor dispute in Zanzibar which halts the packing of cloves which is the United States' sole supply.

[54] 52 Stat. 1060 (1938); 29 U.S.C. § 203(d)(e).

[55] 75 Stat. 65 (1961); 29 U.S.C. § 203(p).

[56] 52 Stat. 965 (1938), expired, 55 Stat. 259 (1942).

that Congress might have intentionally included regulation of ships of foreign flags in the general language of any labor laws it has adopted. The Congress must be presumed to have legislated with full knowledge of the decisions of this Court requiring a clearly expressed intent before a statute is held to violate conflicting international law.[57]

Court interpretations of other statutes relating to the regulation of vessels have consistently excluded their operation over foreign flag vessels on the high seas. The Act prohibiting advances of wages to seamen was held inapplicable to a foreign ship with a foreign crew putting in at an American port, if the advances had been made outside the United States. Though the statute contained universal language, this Court inferred such an exception.[58] A law entitling seamen to receive one-half of accrued wages in every port that the ship entered, was held applicable to foreign ships while in an American port but only as to wages that had accrued.[59] This case, however, involved an application of the statute to require an action to be performed only within the United States. When this Court considered the application of a statute to activities beyond American national waters as in the *Sandberg* case,[60] the statute was held inapplicable.

The Eight Hour Law governing employment and Government contracts was held inapplicable to government work performed on American bases in a foreign country, even though the statute used the terms "every contract" and included no exceptions. This Court said:

> ". . . legislation of the Congress, unless a contrary intent appears, is meant to apply only within the ter-

[57] See *supra*, pp. 32-34.

[58] *Sandberg* v. *McDonald*, 248 U.S. 185.

[59] *Strathearn S.S. Co.* v. *Dillon*, 252 U.S. 348.

[60] *Supra*, footnote 58.

ritorial jurisdiction of the United States . . . An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose." [61]

This Court has never held that use of all inclusive language of domestic labor regulation should receive extraterritorial application.[62]

Nor indeed does the legislative history of the NLRA indicate that there is any intention whatsoever to apply its regulation to foreign flag vessels. The voluminous legislative history is utterly devoid of any such hint that this might have been in the intent of either body of Congress in formulating this legislation. Certainly, the fact that when Congress dealt with the particular problems of maritime labor relations, in the 1938 Amendment to the Merchant Marine Act of 1936, three years after the enactment of the NLRA, it denied application of the legislation to foreign flag vessels, makes it crystal clear that Congress never intended that NLRA operate aboard foreign flag vessels either on the high seas or within the territorial waters of the United States.

Indeed, there are positive indications in NLRA's legislative history which refute the Board's position. This Court

[61] *Foley Bros. v. Filardo*, 336 U.S. 281, 285-86. *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, is not to the contrary. There the Court upheld the application of the Fair Labor Standards Act to an American contractor performing work on a United States Government military base on territory outside the United States but subject to its jurisdiction pursuant to a very long term lease from the British Government. The Court found that the leased base was a "possession" under the Act to which Congress expressly intended the Fair Labor Standards Act to apply.

[62] See also, *The Apollon*, 22 U.S. (9 Wheat.), 362, 370-72; *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 198; *Sandberg v. McDonald*, 248 U.S. 185, 195; *Jackson v. S.S. "Archimedes"*, 275 U.S. 463, 467; *N.Y. Central R.R. v. Chisholm*, 268 U.S. 29, 31.

so found in holding that the sense of NLRA's legislative history was to restrict its application to the labor problems of American workingmen.[63]

The Board further claims (Brief p. 43) that the jurisdictional freezing clause of the Landrum-Griffin Amendment of 1959 to the NLRA enacted since the Taft-Hartley Act, provides authority under the NLRA for Board jurisdiction over foreign flag vessels.[64] The Board argues that since in the year prior to the enactment of these amendments, it asserted jurisdiction over foreign flag ships in the case of *Peninsular & Occidental Steamship Co.*, 120 NLRB 1097 (May 23, 1958),[65] this provision now grants a legislative seal of authorization and command to this and to every exercise of its jurisdiction prior to August 1, 1959.

This is erroneous for two reasons. *First*, this clause, 14(c) (1), is irrelevant to the scope of the Board's authorized jurisdiction. The purpose of this provision was to allow States to assume jurisdiction over labor matters in interstate commerce over which the Board although au-

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[63] *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 143-144.

[64] P.L. 86-257, § 701 added: "(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." (73 Stat. 519 (1959))

[65] The Board's imputation in footnote 54, page 53 of its Brief that the Honduran Labor Code was formulated after its decision in this case is erroneous. The history of Honduran Labor Laws goes back to 1953 when the Ministry of Labor was established and machinery was set up to provide for government intervention in labor disputes. In 1955 a Charter of Labor Guarantees was enacted to provide a wide range of assurances for workers. This basic labor law was amplified and recodified under the 1957 Constitution, and this recodification was formulated before this NLRB decision. See LABOR LAW AND PRACTICE IN HONDURAS, Bureau of Labor Standards Report No. 189, United States Department of Labor (1961), p. 16 ff.

thorized to control, nevertheless declines to take jurisdiction. Congress in enacting the freezing clause of this amendment was merely declaring where matters are within the Board's authorized jurisdiction, the Board may not refuse to exercise the power if has been granted. This provision does not go to the scope of the Board's grant of power in any way. It goes to the question of the Board's *standards* of discretion stated in dollar amounts of commerce the Board will require in undertaking to exercise such authority as it already possesses.

Secondly, there is absolutely no comment in the lengthy legislative history on this provision to indicate that the question of Board jurisdiction over foreign flag ships had ever entered the Congressional consciousness. The provision was intended to cover an entirely different problem: to eliminate the "no-man's land" arising out of this Court's decision in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1.

Neither the House Bill (H.R. 8400) nor the Senate Bill (S. 1555) contained this jurisdictional freezing clause. It was first formulated in the Senate-House Conference. The House wished the States to have the power to exercise their own jurisdiction over matters which the Board refused to exercise its authority. The Senate wished to have the Board's jurisdiction actually enforced to the complete extent of its authority under the NLRA. The House prevailed, but the freezing clause proviso was added in the House-Senate Conference to freeze the monetary standard (i.e. $50,000 etc.) which the Board was then setting for the exercise of its authority, so that the people concerned would not be subject to a rapid expansion and contraction of these standards which had recently occurred prior to the time of the enactment of this proviso.[66] Thus, there is

[66] House-Senate Conference Report, H.R. Rep. 1147, 86th Cong. 1st Sess. (1959) pp. 36-37.

nothing in the meaning, the language, or legislative history of this Amendment in 1959 that could possibly lend credence to any notion that Congress had intended therein to extend the NLRA to foreign flag vessels.

Further, and most conclusively, this Court determined directly in *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, that the NLRA, as amended in 1947, does not apply to picketing of a foreign flag vessel in an American port on behalf of foreign seamen so as to preclude a claim for damages in the State courts. In reaching its decision this Court said:

> "Our study of the Act [NLRA] leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. . The whole background of the Act is concerned with industrial strife between American employers and employees. . . . What was said [in its legislative history] inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." (Id. at 143-144.)

So this Court itself having studied the NLRA and its legislative history has determined that it was never meant to apply to foreign flag shipping. But the Board claims that the *Benz* decision is narrowed by the Court's reference to the fact that the foreign flag vessel was only "transiently" in American waters (Brief p. 37). There is no need to stop to consider how any operating merchant vessel could be non-transient. Far from being a narrowing stricture on this decision, the Court reference suggests the absurdity of applying the Act to foreign flag shipping enterprises which only sporadically touch United States shores as well as the shores of many other nations. The Court's statement

of the inapplicability of the NLRA to foreign seamen on foreign vessels does not imply such a limitation. And if the NLRA as construed by this Court in *Benz*, *supra*, does not apply to a foreign flag vessel in an American port it is manifestly clear that it does not apply to such a vessel on the high seas.

Recently this Court in *Marine Cooks and Stewards* v. *The Panama Steamship Co.*, 362 U.S. 365, had occasion to refer to *Benz*, when the issue arose as to whether the Federal courts were denied authority by the Norris-LaGuardia Act from enjoining picketing of a Liberian flag ship docked in a United States port. The Court (in deciding that the authority of the Federal courts to enjoin had been taken away) held that Congress passed the Norris-LaGuardia Act only to curtail and regulate the jurisdiction of courts, not, as it passed the Labor-Management Relations Act (Taft-Hartley), to regulate the conduct of people engaged in labor disputes. And the *Benz* case, said the Court, decided that the Labor Management Relations Act does not govern labor relations on a foreign ship.

The United States Government in commenting on the *Marine Cooks* decision in its Brief Amicus to the Board in these cases now before the Court declared:

> "Thus, as recently as last term [October term, 1959] the Supreme Court has reiterated that Congress has manifested an intent that the Act directed at affording American workingmen new legal rights shall not be extended to cover foreign seamen on foreign vessels and the Supreme Court has refused to apply the Labor Management Relations Act to them."[67]

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[67] Brief *Amicus Curiae* of the United States Government to the Board, p. 5.

The Department of State also gave its opinion to the Board in this very case that:

> "The potentially serious international repercussions in the relations between the United States and those countries which could be created by such assertion of jurisdiction by the Board over ships flying the flags of those countries are clearly indicated by the diplomatic notes already received by the Department of State from those Governments on this subject. . . . Copies of these notes have previously been transmitted by the Department to the Board. . . . The assertion by the Board of jurisdiction over foreign flag vessels and the application to them of American labor laws would in many instances also be contrary to accepted principles of international comity."
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> "The Department of State considers that in the above connection, the Board should take particular note of the possibility that its assertion of jurisdiction over foreign flag vessels might invoke the enactment of defensive legislation or the taking of retaliatory action by the States affected."[68]

This confirms the basic fears voiced by this Court in *Benz* as to the disruptive and retaliative consequences of applying United States labor laws to foreign flag vessels. The single purpose of the NLRA is to serve to settle disputes among and between American employers and American employees which might disrupt American interstate and foreign commerce.[69] The Board is going beyond even the policy interests of the labor legislation under which it operates in the action it has taken here.[70]

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[68] *Id.*, pp. 26-27.

[69] *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 143-144.

[70] *Ibid.* See also 61 Stat. 136, 29 U.S.C. § 151.

IV.

The Board's Novel "Contacts" Theory Provides an Unprecedented Violation of International Law of Flag State Sovereignty.

The Board has asked this Court to adopt the principle that when a nation shall unilaterally determine that its self-interest has sufficient "contacts" with a foreign enterprise it can extend its domestic legislation to such foreign enterprise. For legal support of its "contacts" theory, the Board borrows the practice of comity of assessing nations' contacts for determining the choice of tort law to apply to maritime injuries affirmed by this Court in *Lauritzen* v. *Larsen*, 345 U.S. 571. The Board claims this case declares a legal principle that any nation is permitted under international law to extend the jurisdiction of its domestic legislation—such as regulatory labor laws—aboard any vessel wherever it goes, if it thinks the vessel's "contacts" with the nation are sufficient. The mere statement of the Board's position reveals its untenability. Yet, this "contacts" theory is the sole principle under which the Board claims that its action is legally justified (R. 33).

Sociedad urges that this "contacts" theory is misapplied by the Board for two reasons: (1) Its use here is itself a violation of international law; and (2) United States law makes it inapplicable to this situation.

International law of flag state sovereignty does not countenance any criteria of "contacts" as to when and where it might be applicable, i.e., diminishing or derogating such sovereignty according to the number of foreign contacts under its jurisdiction. The contacts theory cannot be a principle ordained by international law. A self-assessed criteria of self-interest denies the very concept of

legal obligation. Neither the United States nor any other nation can decide to heed international law only when sufficient contacts or interests of the nation are not involved.

Such notions are clearly contrary to the judgment of this Court in *Lauritzen* on which the Board solely relies. The contacts theory was stated in *Lauritzen* not as a rule of international law but as a proposition of comity for choosing the law of liability to be applied to maritime torts. The Court clearly was not entertaining the question of one nation displacing the regulatory authority of another sovereign aboard ships under its registry and flag, for the Court emphasized that the law on shipboard "cannot change at every change of waters." (*Id.* at 585.)

This Court in *Lauritzen* carefully confined its contacts theory to conflicts in international maritime tort jurisdiction. This court recognized that in maritime practice the choice of which nation's tort laws apply is only a matter of comity and has never been the subject of a universal and uniform prohibition to states which is the substance of international law:

> "International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own."[71]

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[71] *Lauritzen* v. *Larsen*, 345 U.S. 571, 582; see also on "contacts" as comity *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382-383.

This declaration can only mean that this Court found no international law question involved in this matter of maritime tort comity application and that the weighing of "contacts" in the decision in *Lauritzen* is not at all concerned with international law, only the practice of international comity in the tort field.

The international conflict of law on tort liability rules is a matter of comity which is indeed slight as compared to a matter of international law and obligation respecting the sovereign prerogatives of a flag state on the high seas. Dual sovereignty has already been condemned by this court as unworkable, *supra*, at note 13. To inject Board jurisdiction over Honduran merchant vessels displaces Honduran regulatory power and brings two nations into a continuous conflict. No such displacement of governmental power and conflict occur in appplying law in a tort case.

There is no international law which prohibits a nation from applying its tort liability rules or legislation to incidents occurring in the territory of another state in an action in its own courts. Such application does not diminish and therefore does not unlawfully derogate the power of a nation over its area of sovereign authority as would the assertion and intrusion of foreign labor regulations. Thus, courts do not find themselves prohibited by international law from extending the Jones Act to tort claims of a foreign seaman arising out of occurrences aboard a foreign flag vessel on the high seas or in foreign ports.[72] The Court in *Lauritzen*, *supra*, would *not* have violated international law if it had applied the Jones Act in that case.

The basic principle is that a nation can exert only as much jurisdiction with respect to matters occurring aboard

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[72] On the high seas, *Carrol* v. *United States*, 133 F. 2d 690 (2 Cir. 1943); and in foreign ports, *Bobolakis* v. *Compania Panamena Maritima San Gerassimo*, S.A. 168 F. Supp. 236 (S.D. N.Y. 1958).

foreign flag vessels on the high seas as it can, with specified exceptions, over matters occurring within the boundaries of the flag state itself.[33] That nations do restrain themselves in application of their tort law to extraterritorial occurrences is a matter of comity which considers the desirability of reciprocity on a basis of accommodation to their notions of due process as well as the nation's interests.

The "contacts" theory, therefore, is not the law which United States Courts apply to problems of international law conflict with an extraterritorial extension of regulatory legislation. This "contacts" theory is merely a description of the international comity practiced by the United States and its courts in maritime torts. It has nothing to do with settling questions of legal obligation under international law.

The "contacts" theory as a criteria for extraterritorial application of the United States labor laws is an unworkable theory of legal obligation. A foreign enterprise, if necessary, can change the relative "weight" of its contacts with the United States, escape jurisdiction thereby and still pursue the same course of business. The Board has urged that the key United States "contacts" in the extension of its labor laws is substantial American beneficial ownership, and substantial activity in United States foreign commerce. Such contacts in this case or any case can be easily altered.

The possibilities are manifold for changing contacts. And, it is not only a deliberate attempt to alter such contacts which could defeat Board jurisdiction but also the very exigencies of changing commercial conditions could cause a varying of contacts without any intended purpose of a shipping company, other than to pursue a profitable carriage wherever it might be found.

[33] Cf. discussion, *supra*, pp. 13-21.

Each time the contacts would vary, the shipping company would be uncertain as to whether they still were considered within the jurisdiction of the Board, and the seamen's unions would be put in an equally tenuous position. Law and order is hardly served by such doubt and uncertainty. Under such churning clouds of destructive doubt it would be impossible for any union to serve its members effectively.

Each time the contacts would vary, the shipping company and the unions could challenge the Board's jurisdiction. An appeal to the courts would most certainly follow. This Court would be constantly called upon to decide—on varying facts—whether the Board properly determined the sufficiency of contacts for the extension of United States labor laws. Illustrative of the difficulties are the differences in findings on the same facts between the Board and the Courts in the very cases here before this Court. The Board's contentions that the United States Circuit Court of Appeals for the Second Circuit added the contacts up incorrectly and weighed them wrongly (Brief, pp. 54-59) is typical of the constant problems which abandonment of the rule of law of flag state sovereignty will cause. What are "substantial contacts" and when do they "outweigh" foreign contacts are uncertain issues of endless potential to foster international disputes and ill will. It is obvious that the courts of other nations would follow United States courts and decide when self-interest required extraterritorial application of domestic regulatory laws. The equally obvious charges of bias would guarantee turmoil and retaliation [74] in maritime relations as decisions of different nations boomeranged upon each other. This court has observed in *Lauritzen* in that "a multiplicity of conflicting and

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[74] *Benz* v. *Compania Naviera Hidalgo*, 335 U.S. 138, 147.

overlapping burdens would blight international carriage by sea."[7]

V

The Board's Order Deposing Honduran Nationality Over Vessels Under Its Registry Is Prohibited Both By a Specific Treaty Agreement and International Law.

The only way in which the Board could extend United States labor laws to Honduran flag vessels on the high seas and within United States national waters without violating the international law of flag state sovereignty on the open sea and the practice of comity in foreign ports would be to establish United States rather than Honduras as actually the flag state with respect to these vessels. This is forbidden by express terms of a Treaty between the two nations, and international law which makes conclusive the nationality of a vessel's registry.

A. *The United States Treaty With Honduras Prohibits Board Displacement Of Honduran National Authority Over Vessels Under Its Registry*

The assertion of Board jurisdiction in this case is precisely the sort of claim which the United States and the Republic of Honduras have agreed by express stipulation of treaty not to press against each other. The Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618 (1929) provides in Article X:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws

[7] 375 U.S. 571, 581.

> in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown."

Thus, it is pointedly in this particular that the United States and the Republic of Honduras have formally agreed that they will not challenge each other's flag status over their vessels and thereby alter their sovereign rights and obligations under international law. Under this treaty, the Board can no more usurp the prerogatives of Honduras as the flag state over its vessels than the Republic of Honduras can deny its obligations and responsibilities to the United States for the conduct of these vessels by merely asserting that American citizens rather than Hondurans own the stock of the ship-owning company. In the face of this treaty any rationale fails which claims that because of beneficial ownership in an American company, these are American, not Honduran vessels.[76] The very purpose of the treaty agreement is to make a vessel's registry settle the question of conflicting assertions of national interest governing a single vessel. All disputes as to which sovereign shall exercise authority and accept responsibility for a particular vessel are thus settled by this Treaty.

The Board's claim (Brief pp. 44-46) that all this treaty means is the right of the nation of registry to label the vessel with its nationality and yet not subject the vessel to its national sovereign authority is fatuous. It is a singular

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[76] After studying similar provisions in over 150 separate treaties, Hawkins concluded: "Under such treaty provisions, nationality of the vessel is determined solely by the state of registry irrespective of the nationality of the owner." Hawkins, COMMERCIAL TREATIES AND AGREEMENTS (1951), p. 6. Walker summarized his study: "A vessel by definition, is deemed to have the nationality of the country whose flag it lawfully flies, without reference to such questions as who owns it or where it was built . . ." Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Amer. Jour. of Inter. Law, 373 at 382 (1956).

effrontery when the Board persists in its opinion after it was advised by the responsible agencies of both governments that the Board's view of their agreement is erroneous.

The Republic of Honduras has unequivocally protested this attempt by the Board to extend its jurisdiction aboard its flag vessels as being in categorical violation of this Treaty (R. 42-43). And the United States Government taking note of the Board's action in this case has just as flatly concurred:

> "A refusal to treat merchant vessels flying the flag of Liberia and Honduras as vessels of those nations would be in direct conflict with our treaty obligations and would, as the Under Secretary of State has pointed out in his letter of October 27, 1950 to the Attorney General . . . create serious difficulties in our foreign relations not only with the nations signatory to these treaties but with other nations, such as Panama, which would be entitled to interpret a refusal to recognize a flag of the ship as a violation of the rules of international law upon which there had been mutual reliance." [77]

Indeed, this firm protest by Honduras is no less vigorous than the protest it received in 1909 at the hands of the United States Government on this same matter. In a moment of zealous concern for its maritime affairs, the Republic by decree imposed the status of Honduran flag sovereignty on all vessels owned by individuals residing in the Republic, natives or foreigners.[78] The United States im-

[77] Brief *Amicus Curiae* of the United States Government to Board, p. 11. See also State Department Regulations 22 C.F.R. §1.110, §1.12.

[78] The Honduran Decree read: "All vessels built in the shipyards of the Republic, or of foreign construction, for the service of individuals residing in the Republic, natives or foreigners, will be considered as Honduranean, and, therefore, cannot fly any other flag." Cf. *Ronoor*, *supra*, note 19, p. 106.

mediately sent a strong note protesting this action which is identical to the ruling which the Board now seeks to impose on the Republic: An assertion of flag state sovereignty over certain vessels beneficially owned by persons of its own nationality, regardless of the fact that they are under the flag of another nation. The United States Government declared with considerable indignation:

> "... if the rather obscure provisions of the Honduranean decree be given the sweeping scope which the words, taken literally, might seem *prima facie* to indicate, the decree would appear to cover vessels holding an American or other foreign registry. If so interpreted, the decree would be clearly violative of the principles of international law and in derogation of the respect due American registry." [79]

The Republic shortly thereafter repealed this decree. The Government of Honduras now emulates the concern of the United States and has agreed with it that such action is violative of international law. But since this incident in 1909, the United States and the Republic of Honduras have come to an even closer understanding and mutual commitment to this principle. By treaty each has given the other a solemn promise not to question the flag state status of vessels bearing their registration. This obligation is a part of the supreme law of the United States.[80]

Though fully cognizant that it is dealing with ships of Honduran registry flying the Honduran flag and subject to this Treaty agreement, the Board resolutely has taken the view that it may disregard the provisions of the Treaty and determine for itself "whether or not the shipping involved is essentially that of this nation and not that of a foreign

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[79] *U.S. For. Rel.* (1909) 367, 368.

[80] U.S. Constitution, Article VI.

nation which the exigencies of international trade have brought in contact with the United States." (Board decision, R. 31, at 33). Driving its error home, the Board said: "we re-emphasize here, that the particular flag or nationality of the vessels involved, as such, plays no role in our determinations." (Id. at R. 34.)

B. *This Court's Decisions Reject the Board's Treaty Interpretation*

This Court has never depended upon the pronouncements of a government agency such as the Board to determine the meaning of a treaty as against the expressed declarations of both states involved. This Court said many years ago that where the parties to a treaty have expressed themselves clearly "[t]here is no room here left for interpretation."[81] Thus, the Board's position stands in direct contradition of the obvious and common sense principle of treaty interpretation expressed by Vattel in 1758:

> "The first general maximum of interpretation is, that it is not allowable to interpret what has no need of interpretation. . . . to go elsewhere in search of conjectures, in order to restrict or extend it, is but an attempt to elude it."[82]

Where treaties are concerned, it is a fully established rule of construction in this Court that "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."[83] Thus, the NLRA which was enacted subsequent to the 1927 treaty now in force between the United States and Honduras must be interpreted in

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[81] *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 70.

[82] Vattel, LE DROIT DES GENS, § 263.

[83] *Cook* v. *United States*, 288 U.S. 102, 120.

accommodation to a previous treaty unless there is a clear warrant to the contrary in its language and legislative history. That there is no such clear warrant in NLRA language, legislative history, or statutory context has been amply demonstrated, and effectively decided by this Court. (See discussion *supra*, pp. 34-42.)

This Court in cases such as this which require construction of treaties has always given great weight to the interpretation made by the Executive Branch of the particular treaty obligations of the United States Government. This Court has said:

> "While the question of the construction of treaties is judicial in its nature, and the courts, when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight."[34]

The United States Government's position that no Board jurisdiction exists to issue the order complained of herein in violation of a treaty has been made clear before the Board, the District Court and this Court. (R. 59; Briefs of the United States Government before the Board and this Court).

C. *The Board's Order Violates International Law Which Makes the Nationality of a Vessel's Registry Conclusive*

But if the United States and Honduras had not agreed by treaty to recognize their respective sovereign rights

[34] *Sullivan* v. *Kidd*, 254 U.S. 433, 442. This consideration stressed in *Kolovrat* v. *Oregon*, 366 U.S. 187, 194, and *Factor* v. *Laubenheimer*, 290 U.S. 276, 294, 295.

and obligations as flag states, the attempt of the Board to assert its jurisdiction and to claim in effect that the Honduran vessels of Empresa are actually American flag ships, by reason of ownership of the stock of the Honduras shipping company by an American corporation, would be asserting that which is completely alien to the law and practice of nations.

Such a conclusion was upheld (with the United States supporting the argument) in a recent opinion by the International Court of Justice when it specifically rejected the nationality of the shareholders of companies owning ships as a criteria of evaluating the ship-owning rank of a nation, saying:

> "To take into account the names and nationalities of the owners or shareholders of shipping companies would, to adopt the words of the representative of the United Kingdom during the debate which preceded the election, 'introduce an unnecessarily complicated criterion.' Such a method of evaluating the ship-owning rank of a country is neither practical nor certain. Moreover, it finds no basis in international practice, the language of international jurisprudence, in maritime terminology, in international conventions dealing with safety at sea or in the practice followed by the Organization itself in carrying out the Convention. On the other hand, the criterion of registered tonnage is practical, certain and capable of easy application."[85]

This Court has also recognized that any attempt to categorize the flag status of a ship by the nationality of its

[85] *Re: Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization, Advisory Opinion*, June 8, 1960, I.C.J. Reports 1960, 150 at 169; 1960 Am. Mar. Cas. 1005 at 1027.

owners is completely alien to any understanding or practice of the United States:

> "The Merritt is not a vessel of the United States .... That she was owned by citizens of the United States did not make her a vessel of the United States. By the statute of 1792 ... only ships which have been registered in the manner therein prescribed shall be denominated or deemed vessels of the United States .... The documents a vessel carries furnish the only evidence of her nationality."[86]

Further, this Court declared in the *Lauritzen* decision that as a matter of international law, to which the United States has firmly adhered, the flag state status of a vessel is conclusively determined by the national character of its valid registration papers, as determined by the flag State:

> "*Law of the Flag.*—Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state."[87]

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[86] *The Merritt*, 84 U.S. (17 Wall) 582, 586. For the leading incident in which the United States Government declared its commitment to this principle, see *The Virginius*, Moore, Dugest, II 895; U.S. For. Rel. (1874) pp. 1035, 1074.

[87] *Lauritzen* v. *Larsen* 345 U.S. 571, 584; Further authorities in support of this rule as a proposition of international law: *The Muscat Dhows Case* (*France* v. *Great Britain*), 1905, The Hague Court Reports, 93, 96, 99

Finally, it should be noted the Board cannot adopt an argument for one purpose which it repudiates for another. The Board cannot claim that Empresa's vessels flying the Honduran flag are nevertheless substantially American flag vessels or effectively American flag vessels, and therefore United States labor laws are applicable to them; and then turn later in its argument and say that it is *not* claiming them to be American vessels in any manner in its application to them of United States labor laws, and therefore, the treaty guarantee of mutual respect for flag nationality is not violated at all. (Board's Brief, pp. 44-46). The Board can hardly plead in argument that which it argues to reject.

It should also be noted that if the Board is successful in establishing for the purpose of American law, that these vessels are effectively ships of American flag status, then 75 per cent of Sociedad's members would be immediately subject to being fired from their jobs because another United States law requires the crew of vessels considered to be under American flag jurisdiction to be composed of at least 75 per cent American citizens.[*] Such are the intolerable conflicts created by the Board's order which put Honduran seamen under an irresolvable contest of two sovereigns' regulatory powers.

There is therefore no warrant in law or reason for the flagrant violation of the Treaty and international law by the Board's order.

(Scott ed. 1916); Wilson, International Law, 125 (3rd ed. 1920); Oppenheim's International Law, 225 (8th ed., Lauterpacht, 1955); Hyde, 1 and 2 (2nd rev. ed. 1945); Kenney, The Test of the Nationality of a Merchant Vessel, 29 (1937); 42 FR, 73-75, 79-116, 187; 1 Hyde, supra, note 19, p. 819; Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927), 201-276.

[*] 46 USC 672(a). See the similar requirement of the Honduran Labor Code where a 90 per cent Honduran citizenship is required. p. 240. See *Hawaiian Fishing Fleet v. United States*, 282 U.S. 181, 191-192, where aliens were held to be protected in their contract rights by the due process clause of the Fifth Amendment.

Conclusion

The judgment of the District Court in this case should be affirmed.

Respectfully submitted,

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NOVEMBER, 1962.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

Nos. 91, 93 and 107

IVAN C. McLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD, *Petitioner*, *against*
EMPRESA HONDURENA DE VAPORES, S.A., *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 91

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, *Petitioner*,
against
EMPRESA HONDURENA DE VAPORES, S.A., *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 93

FRANK W. McCULLOCH, CHAIRMAN, AND PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, AND GERALD A. BROWN, MEMBERS, NATIONAL LABOR RELATIONS BOARD, *Petitioners*,
against
SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 107

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE
and
BRIEF OF THE GOVERNMENT OF THE REPUBLIC OF HONDURAS AS AMICUS CURIAE

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IN THE

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NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, *Petitioner*, *against*
EMPRESA HONDURENA DE VAPORES, S.A., *Respondent*
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT — **No. 93**

FRANK W. McCULLOCH, CHAIRMAN, AND PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, AND GERALD A. BROWN, MEMBERS, NATIONAL LABOR RELATIONS BOARD, *Petitioners*, *against*
SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL, *Respondent*
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT — **No. 107**

MOTION OF THE GOVERNMENT OF THE REPUBLIC OF HONDURAS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

In consequence of the effort by the National Labor Relations Board to extend the jurisdiction of the United States labor laws and regulations aboard certain vessels of Hon-

duran registry and flag and so to displace the sovereign authority of the Republic of Honduras rightfully exercised over these vessels, the Government of the Republic of Honduras respectfully moves for permission to file a brief *amicus curiae* in the above entitled actions.

The Solicitor General of the United States has consented to the filing of this brief on behalf of the members of the National Labor Relations Board, Petitioners in Case No. 107, and Ivan C. McLeod, Regional Director for the Second Region of the National Labor Relations Board, Petitioner in Case No. 91. Empresa Hondurena de Vapores, S.A., Respondent in Cases No. 91 and 93, and Sociedad Nacional de Marineros de Honduras, Respondent in Case No. 107 have also consented to the filing of this brief.[5] The National Maritime Union of America, AFL-CIO, Petitioner in Case No. 93, has also consented. In a Note dated August 10, 1962, addressed by the Department of State to His Excellency the Ambassador of Honduras, the Department of State, acting under its own initiative, offered the following statement with respect to these cases:

> "I wish to inform you that in the event your Government should desire to make a direct presentation to the Supreme Court as amicus curiae, you could be assured of the consent both of the Department of State and of the Solicitor General."

In support of its request to be heard in this litigation, the Republic of Honduras advises the Court that the authority and content of labor laws and regulations asserted by the National Labor Relations Board conflict with Honduran labor laws and authority presently being enforced aboard these Honduran vessels by the Republic of Honduras, and that it cannot acquiesce in such an interference nor can it allow concurrent jurisdiction. Such action violates rights

of the Republic of Honduras under international law and contravenes certain binding treaty obligations of the United States with the Republic of Honduras. This attempt by the National Labor Relations Board to extend its authority is not consistent with amicable relations between the United States and the Republic of Honduras.

It is respectfully requested, therefore, that this motion be granted.

Respectfully submitted,

JAMES F. SAMS,
THORBURN REID,
Counsel for THE GOVERNMENT OF THE REPUBLIC OF HONDURAS.

Certified:

Céleo Dávila,
Ambassador of the Republic of Honduras to the United States of America

Dated: November 19, 1962.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

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IVAN C. McLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD, *Petitioner*, *against*
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SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL., *Respondent*
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT — **No. 107**

BRIEF OF THE GOVERNMENT OF THE REPUBLIC OF HONDURAS AS AMICUS CURIAE

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement

The Republic of Honduras is confronted with the determination of the National Labor Relations Board [NLRB],

an agency of the United States Government, to suppress the authority of labor laws and regulations of the Republic of Honduras over certain of its vessels and supplant them with those of the United States while these vessels are within the territorial waters of the Republic of Honduras, and on the high seas, and within the national waters of the United States. These are vessels of Honduran registry and fly the Honduran flag. They comprise over half of the Honduran Merchant Marine Fleet.[1] This action by the National Labor Relations Board compromises the responsibility of the United States Government under international law and under the Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras, dated December 7, 1927. 45 Stat. 2618 (1929), T.I.A.S. No. 956.

The Republic of Honduras cannot permit this to occur. Consequently, it is grateful for an opportunity to file this brief as an initial step in its determination to nullify these efforts of the National Labor Relations Board.

The Government of Honduras considers that the labor laws of the Republic of Honduras are to be exercised over Honduran vessels without any limitation. In pursuing its national interest, the Republic of Honduras cannot consent to have its authority and regulation of labor matters aboard its merchant vessels usurped in any manner by another nation and put beyond Honduran governing control and responsible concern.

The right of the Government of the Republic of Honduras to protest and refuse to permit such action is based on:

(1) International law which strictly prohibits nations from interfering in the exercise of a sovereign's

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[1] There are currently twenty-one vessels in the Merchant Marine Fleet of Honduras. Thirteen of these vessels are involved in this case.

authority within its territorial jurisdiction which includes its national waters;

(2) International law which strictly prohibits a violation of flag state sovereignty over vessels on the high seas;

(3) The universal practice of international comity which grants flag state control over internal management of its vessels within foreign ports;

(4) A treaty agreement between the United States and the Republic of Honduras confirming international law and practice which makes conclusive the sovereign authority of a nation over vessels registered under its laws and flying its flag;

(5) A treaty agreement between the United States and the Republic of Honduras which prohibits discriminatory treatment of each other's merchant vessels within their territorial waters which differs from that accorded to the vessels of a nation more favored.

The government of the Republic of Honduras is primarily interested in maintaining its exclusive jurisdiction over these Honduran vessels; however, this attempted violation of its rights as a sovereign nation drastically undermines the principal foundations of law and order among nations. The Government of Honduras therefore feels obliged to take upon itself the larger responsibility to defend with adequate determination the concern of the community of nations.

The rights of the Republic of Honduras are violated by assertions of an agency of the United States Government which ignore obligations of international law by declaring that it shall extend its power and authority abroad wherever it finds an activity with a favorable balance of national "contacts" or connections. The National Labor Relations Board in the instant case has declared that when the United States shall discover that a foreign enterprise has the United States

"contacts" of stock ownership by its nationals and of entering into United States commerce, then the domestic regulatory powers of the Government shall extend over this enterprise wherever it may operate. This assertion by the National Labor Relations Board purports to displace the authority of the Republic of Honduras to exercise its sovereign power to legislate similarly within its own jurisdiction. This ignores the fundamental rule of international law which prohibits interference in the exercise of a sovereign's authority within its own jurisdiction. The Government of the Republic of Honduras must uphold the principle that self-assessment of interest or "contacts" is not and cannot be the criterion of obligation under a principle of international law. The Government of the Republic of Honduras therefore, rejects this theory of "contacts" as a basis for applying United States labor laws upon any *locus* under Honduran sovereign jurisdiction.

ARGUMENT

I. International Law Strictly Prohibits Nations from Interfering in the Exercise of a Sovereign's Authority Within Its Territorial Jurisdiction Which Includes Its National Waters.

The National Labor Relations Board has asserted the rights of sovereign jurisdiction of American labor laws on board Honduran flag vessels even while they are within the national waters of the Republic of Honduras and docked at their home ports. American labor laws cannot be enforced among Honduran seamen on the docks of Honduran ports and aboard these vessels within Honduran national waters. This kind of interference by an agency of the United States Government cannot be tolerated by the Government of the Republic of Honduras. This Court surely needs no detailed

statement of either the facts or the law to reach a similar conclusion.

II. The Universal Practice of International Comity Grants Flag State Control Over Internal Management of Its Vessels Within Foreign Ports.

The NLRB has also asserted the rights of sovereign jurisdiction of American labor laws aboard these Honduran flag vessels within American Waters. The Government of the Republic of Honduras is aware that foreign merchant vessels, while within the territorial waters of another nation, could be subject to the authority of that nation just as foreign merchant vessels, while within Honduran territorial waters, could be subject to the jurisdiction of Honduras. Nevertheless, by international comity and custom practiced for hundreds of years, the United States,[2] Honduras, and every other nation of the world have universally refrained from interfering in the internal management of labor relations of foreign flag vessels within their national waters. Nations traditionally refrain from any interference in the internal order and economy of ships while within their territorial waters unless the peace and order of the port are threatened by activities aboard these foreign flag vessels.

Although labor laws governing comprehensively the relationship between employer and employee in land enterprises are relatively new, such regulations governing the compensation and conditions of the employment relationship of captain and crew are ancient. The oldest recorded code of labor law between master and mariners is the Roman-Byzantine law of Rhodes, circ. 800 A.D. Nations from time immemorial have refrained from asserting a right to govern the internal management of labor relations

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[2] *Wildenhus's Case*, 120 U.S. 1, 12.

aboard foreign vessels within their ports except in the humane consideration of hearing a sailor's plea that the captain or the vessel were unfit to go to sea, or more recently in the case of such incidents occuring aboard these vessels which disturb the peace and order of the port.

Labor laws governing maritime employer-employee relationships have been subsumed in the recent labor-management codes of modern societies. Even though the reach of such statutes literally covers all enterprises in territorial waters, the time-honored practice of this comity remains unaltered. To violate this practice now would be to destroy a working understanding which has been subject to the scrutiny of countless generations and left undisturbed. Reason compels this comity. Without this reciprocal arrangement, the order of life aboard each vessel would abruptly change at every port of call. The unwarranted difficulties of commerce so conditioned are too obvious to merit further discussion.

To preserve this tried and proven, common-sense principle of order, the Republic of Honduras must ensure that the comity which preserves this order will be continually practiced. This comity must be preserved lest a successful breach tempt experiment by other nations—until finally every government is forced to seek its own interests or suffer itself to be uniquely disadvantaged.

III. International Law Strictly Prohibits a Violation of Flag State Sovereignty Over Vessels on the High Seas.

The NLRB has asserted the rights of sovereign jurisdiction of American labor laws aboard these Honduran flag vessels on the high seas. International law has carefully declared that the flag state maintains on the high seas the

exclusive rights of sovereignty aboard vessels registered under its laws and flying its flag which it exercises within its geographical jurisdiction. The Permanent Court of International Justice in the case of the *S.S. Lotus* declared in its affirmative judgment on this principle of international law:

> "It is no doubt true that all or nearly all writers teach that ships on the high seas are subject exclusively to the jurisdiction of the state whose flag they fly . . . which is equivalent to saying the jurisdiction of the state over vessels on the high seas is the same in extent as its jurisdiction in its own territory."[3]

To impose alien labor laws aboard foreign flag vessels on the high seas is to intrude and depose the sovereign authority of the flag state to regulate similarly. Such an intrusion is a clear violation of the principle of international law guaranteeing flag state sovereignty on the high seas. National interest does not justify a violation of this or any obligation under international law. The Government of the Republic of Honduras, therefore, rejects this theory of national "contacts" as a basis for the assertion of United States labor laws over its vessels on the high seas.

The United States has an outstanding record of support for the international law of flag state sovereignty on the high seas. Throughout United States history not only has there been repeated affirmation by the Department of State, but this Court has had occasion to establish its recognition of this principle of international law. *U.S.* v. *Rodgers*,

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[3] *The S. S. Lotus*, P.C.I.J., Ser. A: No. 10 (1927), reported in 2 *Hudson* World Court Reports, 20, 41 (1935).

150 U.S. 249, 264. In *Maul* v. *United States*, 274 U.S. 501, 511, this Court expressed its understanding that:

> "The high seas are common to all nations and foreign to none, and every nation having vessels there has power to regulate them and also to seize them for violation of its laws."

Accordingly, this Court has consistently acknowledged the exclusive power and authority inherent in the rights of flag state sovereignty on the high seas. It has declared that a seizure by the United States of a foreign flag vessel on the high seas for a violation of its municipal laws is invalid. *The Antelope*, 10 Wheat. 66.

The NLRB, therefore, cannot enforce on the high seas nor in Honduran waters the jurisdiction it asserts. An interference with Honduran vessels by an agency of the United States Government on the high seas would constitute a violation of the international law of flag state sovereignty.

If any question is raised as to whether the Republic of Honduras is seriously interested in asserting its sovereign rights aboard its flag vessels on the high seas and within its own ports, attention is drawn to the careful and intimate concern which the Republic of Honduras has exercised over the conduct of its maritime enterprises. The *Honduran Organic Act of the National Merchant Marine* of 1943 was recently supplemented in 1959 by the *Honduran Labor Code* which included 45 special provisions regulating the employment relationship between master and mariner aboard its flag vessels, and the working conditions under which these enterprises shall be conducted. A translation of the Honduran Labor Code, including Chapter 7, *Work at Sea and On Inland Waterways*, § 220-265, appears in Appendix B of this brief. The Court's attention is particularly addressed to the provisions stating that a Honduran

union is forbidden to subject itself to foreign authority (§ 499f) and that person may jeopardize the rights of a Honduran Union (§ 469).

It should be noted that the employment security of Honduran seamen is protected in a provision requiring that 90 percent of union membership be citizens of the Republic of Honduras (§ 504) and that 90 percent of the seamen on the master roll of a Honduran vessel be of Honduran nationality (§ 240). As this Court knows, the United States in pursuit of similar interests has an identical policy in requiring 100 percent of the officers and at least 75 percent of the crew of merchant vessels flying the United States flag to be citizens of the United States, Merchant Marine Act, 1936, 46 U.S.C. § 672a, (a)(b).

The interests of seamen on Honduran vessels are guaranteed enforcement because their Honduran union is empowered to represent its individual members before the proper authorities in Honduras on any matter arising out of their employment.[4] An individual seaman far from Honduras, who for any reason has a dispute concerning wages owed to him on any claim, or any treatment to which he has been subjected by his employer arising out of his employment though not connected with his union affiliation, may have his union bring suit on his behalf before the authorities in Honduras for immediate settlement.

The Constitution of the Republic of Honduras declares that in enterprises of national interest, specifically including the merchant marine, it is particularly prohibited to renounce rights and obligations governing the labor relationships of merchant marine enterprises.[5]

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[4] Honduran Labor Code § 491 (4); 492 (2).

[5] Article 116 states that the law shall regulate contracts for merchant marine workers, taking into account the peculiar features involved. Article 122 states that an agency of the Honduran Government is to supervise all labor disputes. Article 132 states: "The rights affirmed in

In the exercise of its governmental concern and responsibility which is required by its Constitution, the Republic of Honduras cannot accept this attempt to assert foreign authority over its vessels.

IV. A Treaty Agreement Between the United States and the Republic of Honduras Confirming International Law and Practice Makes Conclusive the Sovereign Authority of a Nation Over Vessels Registered Under Its Laws and Flying Its Flag.

It must be further noted that the only way in which the United States could apparently avoid the censure of international law would be to claim by asserting this theory of "national contacts" that these vessels flying the flag of Honduras and registered under its laws are to be considered vessels holding the nationality of the United States rather than the Republic of Honduras. The untenability of such a claim need only be briefly set forth.

First, the United States and the Republic of Honduras have formally agreed under Article X of the Treaty of Commerce, Friendship and Consular Rights to recognize the nationality of such vessels as determined by registration under their respective laws.[6]

Secondly, as a matter of international law, a vessel is given the national character of the nation under whose

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this chapter cannot be renounced. Any stipulations that restrict or suppress them shall be null and void." These Articles appear in full text at Appendix A, herein.

[6] *Article X.* Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown. *Treaty of Commerce, Friendship and Consular Rights of 1927,* (*supra,* p. 6).

laws it is registered.[7] The United States Department of State[8] and this Court[9] have given continued recognition, along with the rest of the nations of the world, to this principle of international law.

Third, it is a practice of nations to identify the nationality of merchant vessels on the high seas by their registration.[10] It is on the basis of registration that the national rights and obligations under maritime conventions for the order of the sea are attributed to one state rather than another. The disruption of the orderly processes whereby nations acknowledge their duties and obligations by virtue of a vessel's registration would have most unfortunate results. The whole system of international conventions for the orderly and safe conduct of commerce on the high seas is regulated, conditioned, and given force by the conclusive character of a vessel's nationality determined by its registration under the laws of a particular nation.

Were the national character of a vessel made uncertain because of the changing characteristics of the nationality of its ownership, or the shareholders of a vessel's owner, the way would be open to avoid all treaty responsibilities and obligations which are made incumbent upon the nation to which the vessel is ascribed. Once the prerogatives of the flag state are usurped and attributed to the nationality of any interest in a vessel's ownership, then the evasion of

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[7] *The Muscat Dhows Case* (*France* v. *Great Britain*), (1905), *The Hague Court Reports*, 93, 96, 100, (Scott ed. 1916). 1 *Oppenheim's International Law* (8th ed. Lauterpacht 1955), p. 330. Higgins & Colombos, *International Law of the Sea* (4th Rev. ed. 1959), p. 250.

[8] *The Virginius*, II Moore's Digest, 895 (1874).

[9] *The Merritt*, 84 U.S. (17 Wall) 582, 586; *Lauritzen* v. *Larsen*, 345 U.S. 571, 584.

[10] Rienow, *The Test of the Nationality of a Merchant Vessel*, at pp. 42-49, 73-78, 79-116, 187, provides an adequate description.

flag state responsibilities by virtue of the same reason could hardly be contained.[11]

V. A Treaty Agreement Between the United States and the Republic of Honduras Prohibits Discriminatory Treatment of Each Other's Merchant Vessels Within Their Territorial Waters Which Differs from That Accorded to the Vessels of a Nation More Favored.

The United States and the Republic of Honduras have agreed under Article VII of the Treaty that neither nation shall discriminate against the other in their treatment of vessels of their respective registry entering their national waters and ports. The two nations agreed that "the nationals of each of the High Contracting Parties equally with those of the most favored nation shall have liberty freely to come with their vessels and cargo, to all places, ports, and water of every kind within the territorial limits of the other which are or may be opened to foreign commerce and navigation."

If the NLRB asserts its jurisdiction over particular vessels of the Republic of Honduras, the question is immediately raised whether such action could be considered discriminatory by imposing unusual conditions upon their "liberty freely" to enter United States waters and dock at United States ports, and thereby violate this treaty obligation of the United States requiring most favored nation treatment for Honduran vessels.

The Government of the Republic of Honduras must further draw the attention of the Court to certain other treaty

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[11] This was particularly the concern of the International Court of Justice when it rejected this notion that ownership could be considered a criteria for determining the category of a vessel's nationality. Re: *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, June 8, 1960. I.C.J. Reports 1960, p. 150.

obligations of the United States with the Republic of Honduras which are called into question by this attempted exercise of jurisdiction by the National Labor Relations Board.

Article XXII of the Treaty of Friendship, Commerce and Consular Rights, (Supra) now in force between the United States and Honduras stipulates that:

> "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, . . . such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit."

This clearly contemplates the exclusive jurisdiction of Honduras with respect to labor matters abroad Honduran vessels within the national waters of the United States. There was no understanding that the proviso with respect to local laws covered anything more than the settlement of obligations on contracts already formed abroad.

But in a larger sense, it is not only the preservation of its rightful sovereignty over its vessels which prompts the Government of Honduras to commit itself so totally to the perfection of its rights. The National Labor Relations Board by destroying principles of international law and practice, does severe violence to the foundations of obligation and order among full and equal sovereigns. The extension of labor regulations is necessarily an attempt to foreclose any other sovereign from exercising similar authority. This direct attempt to inhibit and limit the power of a sovereign within its own jurisdiction is most clearly

an unquestionable violation of that fundamental principle of international law which prohibits such interference.

The NLRB assumes the position that the observance of this basic international law shall not be incumbent upon the United States when it determines that a favorable balance of United States "contacts" exists with respect to a foreign enterprise.

In this case, the National Labor Relations Board acting with the authority of the United States has declared that there are sufficient "contacts" to extend its sovereign jurisdiction over a foreign enterprise when it is financed by United States citizens and engages in some commerce with the United States. This has obvious and regrettable implications. The majority of the community of nations are struggling to strengthen their economies and so raise their standard of living. A major factor in this global effort is foreign investment in enterprises which often become productive for such development by their engaging in commerce with the country of the investors. Investment by citizens of the United States is one of the great motive forces in this world-wide effort, but the decision of the National Labor Relations Board could seriously jeopardize the possibility of continued progress.

For these reasons the Republic of Honduras is resolutely committed to prevent the application of the United States Labor Laws over its vessels. In the light of these same reasons, we respectfully ask this Court to continue to deny the extension of American labor laws to foreign flag vessels as it has done recently in the case of *Benz* v. *Compania Naviero Hidalgo*, 353, U.S. 138, 143-4.

Conclusion

This Court should reaffirm the principle of international law prohibiting interference with the sovereignty of nations within their territorial domain, the principle of international law prohibiting interference with flag state sovereignty on the high seas and the universal practice and custom of nations in affording comity in foreign ports proscribing the extension there of domestic labor laws over foreign flag vessels.

It is respectfully urged, therefore, that this Court should reject this unfounded extension of jurisdiction of the United States National Labor Relations Board.

Respectfully submitted,

JAMES F. SAMS,
THORBURN REID,
Counsel for THE GOVERMENT OF THE REPUBLIC OF HONDURAS.

Dated: November 19, 1962

Certified:

Céleo Dávila,
Ambassador of the Republic of Honduras to the United States of America.

APPENDIX A

Provisions of the Constitution of the Republic of Honduras

Relevant Provisions of the Constitution of the Republic of Honduras of 1957

Title V

Social Guarantees

Chapter II

Labor and Social Welfare

. . . . . .

Article 116. The law shall regulate contracts for railroad, mine, merchant marine, and aviation workers, taking into account the peculiar features involved.

. . . . . .

Article 122. A labor jurisdiction is established, to which will be submitted all disputes arising from relations between capital and labor. The law shall establish rules governing this jurisdiction and the agencies by which it is to be put in practice.

. . . . . .

Article 132. The rights affirmed in this chapter cannot be renounced. Any stipulations that restrict or suppress them shall be null and void.

APPENDIX B

Translation of the Honduran Labor Code

International Labour Office

Legislative Series 1959—Hon. 1

HONDURAS 1

Labour Code

Decree No. 189, to promulgate a Labour Code. Dated 1 June 1959. (*La Gaceta*, 15-18 and 20-23 July 1959, Nos. 16827-16834.)

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Part I. General Provisions

SOLE CHAPTER. GENERAL PROVISIONS

1. This Code governs the relationships between capital and labour, establishing them on a basis of social justice so as to guarantee the worker such conditions as are necessary for a normal life and ensure that capital obtains a fair return on its investments.

2. The provisions of this Code render any agreement to the contrary null and void and are binding on all undertakings, businesses, establishments and natural persons. The foregoing does not apply to—

(1) agricultural and stockbreeding concerns not permanently employing more than ten workers;

(2) public servants employed by the national, departmental and municipal authorities. The term "public servant" means any person whose post has been created by the Constitution or by law, executive decree or municipal order.

The relationships between the state, departmental and municipal authorities and their employees shall be governed by such civil service laws as may be published;

(3) such provisions as are stated by this Code to be applicable only to specified persons or undertakings.

In the event of a serious national emergency, workers employed on state projects and paid out of the relevant appropriations shall be subject to the provisions of this section.

3. All transactions or stipulations implying any relinquishment, reduction or misrepresentation of the rights conferred on workers by the Constitution, this Code, the regulations made thereunder and the other labour and social welfare laws shall be *ipso*

jure null and void, even if contained in a contract of employment or any other kind of agreement.

4. The expression " worker " means any natural person hiring his services, whether physical or intellectual, or both, to any other person or persons, whether natural or artificial, in return for the payment of remuneration under a contract of employment or an employment relationship.

5. The expression " employer " means any natural or artificial person under private or public law using the services of one or more workers under a contract of employment or an employment relationship.

6. The following shall be deemed to be representatives of the employer and as such shall commit him in their relations with the other workers: directors, managers, administrators, masters of vessels and, in general, all persons discharging managerial or administrative duties on behalf of any other person.

7. The expression " middleman " means any natural or artificial person under private or public law who in his own name engages the services of one or more workers for the performance of any job on behalf of an employer. The latter shall be jointly liable for the actions of the former vis-à-vis the worker or workers for all legal purposes under the Constitution, this Code, the regulations made thereunder and the social welfare laws.

8. In the event of a conflict between the labour or social welfare laws and any other law, the former shall prevail.

No such rule shall apply as between the social welfare laws and the labour laws.

9. Every contract of employment shall be open to review if unforeseen and important changes occur in the normally prevailing economic situation.

Where application is made for the review of a contract of employment, the procedure laid down in section 71 shall be observed.

10. It shall not be lawful to take any form of reprisals whatsoever against workers with the object of preventing them either wholly or in part from exercising the rights conferred on them by the Constitution, this Code, the regulations made thereunder or the other labour and social welfare laws or by reason of their having exercised or attempted to exercise such rights.

11. It shall not be lawful for any person to employ a number of Honduran workers representing less than 90 per cent. of the total staff or to pay them less than 85 per cent. of the total wages earned in the undertaking concerned.

Both percentages may be altered—

(a) if there is an obvious need to do so to protect and encourage the national economy, to make good a shortage of Honduran technicians in any particular activity or to safeguard Honduran workers who have furnished evidence of their abilities. In such circumstances the Executive shall have power to issue a substantiated decision issued through the Ministry of Labour and Social Welfare, either reducing both percentages by not more than 10 per cent. for a period of five years in any undertaking or increasing them to such an extent that alien workers are eliminated.

Where the Ministry authorises a reduction in the above percentages, it shall require the undertakings concerned—

(1) to carry out effective training programmes for Honduran workers at once;

(2) to submit detailed reports every six months, or whenever so requested by the Ministry of Labour and Social Welfare, showing the posts occupied by aliens and the qualifications, skills and duties attaching thereto. Where the General Inspectorate of Labour, after due investigation, declares that Honduran workers are capable of filling the specialised posts efficiently, the Ministry of Labour and Social Welfare shall request the undertaking to substitute a Honduran worker for the alien;

(b) if persons immigrate with the permission and under the supervision of the Executive or have been recruited by the Executive under contract and enter or have entered the country to work in the establishment or development of agricultural or stock-breeding settlements or social welfare or cultural institutions; or if the workers concerned are of Central American origin.

In all the cases mentioned above the extent of the alteration shall be fixed at the discretion of the Executive: Provided that the order issued through the Ministry of Labour and Social Welfare shall clearly state the reasons for the alteration and its duration and extent.

In calculations made for the purposes of the first paragraph of this section all fractions shall be disregarded and, if the total number of workers is not more than five, four of them shall be Hondurans.

The provisions of this section shall not apply to the managers, directors, administrators, supervisors and departmental chiefs of undertakings, on condition that there are not more than two of them in any single undertaking.

Any pretence of being a society and, in general, any transaction or contract contravening the foregoing provisions shall be *ipso jure* null and void and shall render the offender liable to the appropriate penalties.

12. It shall not be lawful to discriminate against any person on grounds of race, religion, political belief or economic situation in any social welfare, educational, cultural, recreational or commercial establishment operated for the use or benefit of the community in any undertaking or workplace, whether under private or state ownership. The social standing of a worker or his access to any of the establishments covered by this section shall not depend on the amount of his remuneration or the importance of his job.

13. No person shall be denied freedom of passage over any highway or other public road leading to a centre of employment or be prevented from transporting goods over any such highway or road if the goods are intended for sale in such centre of employment.

14. It shall not be lawful to hamper the freedom of trade in centres of employment. Only such fees or taxes shall be levied in connection with such trade as are prescribed by law.

15. No alcoholic beverages or narcotic drugs shall be sold in or brought into any centre of employment, nor shall any person engage in cock-fighting, games of chance or prostitution in any such place. It is understood that this prohibition is limited to a 3-kilometre radius around any centre of employment located outside a town or village, since towns and villages are subject to the provisions of the appropriate laws and regulations.

16. It shall not be lawful to use a foreign language in any order, instruction, notice or communication issued to the workers.

Posts involving the immediate direction or supervision of work shall be held by Spanish-speaking persons.

17. No charges for stamped paper or for stamps shall be levied in connection with any legal transaction, document or record drawn up in the presence of the labour, judicial or administrative authorities in application of this Code, the regulations made thereunder or the other labour or social welfare laws.

The same shall apply to contracts and agreements, whether individual or collective.

No charge shall be made for the services rendered by officials of the labour authorities to private persons.

18. Matters not covered by this Code, the regulations made thereunder or the other labour laws shall be settled, firstly, in accordance with the principles of labour law, secondly, in accordance with equity, custom and local usage, having regard to the said principles, and lastly, in accordance with the provisions of the Conventions and Recommendations of the International Labour Organisation and the principles of ordinary law, judicial practice and legal theory.

Part II. Contracts of Employment

Chapter I. Individual Contracts of Employment

Definition and General Principles

19. The expression "individual contract of employment" means a contract whereby a natural person undertakes to do a job or hire his personal services to some other person, whether natural or artificial, under the continuous authority or direction of the latter and in return for remuneration.

The expression "continuous authority" implies an obligation on the worker to carry out the employer's orders and instructions, whether given in person or through some other person, in all matters relating to the job done.

20. For a contract of employment to exist there must be the following three essential elements:

(a) personal activity on the part of the worker, i.e. activity performed by the worker himself;

(b) continuous authority or direction exercised by the employer over the worker, whereby the employer has the right to require the worker to carry out his orders at any time with respect to the manner, hours or quantity of work, and to make him subject to certain rules. Such authority or direction shall be maintained throughout the period of the contract; and

(c) a wage as the remuneration for the services performed.

Given the three elements indicated in this section, a contract of employment shall be deemed to exist and shall not cease to exist simply by reason of the name given to it or by reason of any other conditions or stipulations to which it is made subject.

21. It shall be presumed that every personal employment relationship is governed by a contract of employment.

22. A worker may make contracts of employment with two or more employers, save where he has agreed to hire his services to one employer to the exclusion of all others.

23. A worker may share in the profits or takings of his employer, but never in his risks or losses.

24. Where a contract of employment is related to or concurrent with any other contract or contracts, it shall not cease to be a contract on that account and shall accordingly be subject to the provisions of this Code.

25. Every individual contract of employment shall be deemed to include at least the guarantees and rights conferred on workers

by the Constitution, this Code, the regulations made thereunder and the other labour and social welfare laws.

26. A contract of employment shall imply an obligation in respect of whatever is specifically agreed to and whatever consequences arise therefrom in accordance with the law, custom, usage or equity. If an individual contract of employment does not expressly indicate the services to be performed, the worker shall be required to do only such work as is consistent with his strength, aptitudes and state of health and as is similar in nature to the work done in the business, activity or trade in which the employer is engaged.

27. Failure to give effect to an individual contract of employment or employment relationship shall imply liability only for those persons whose economic responsibility (i.e. for the services or payments prescribed in this Code, the regulations made thereunder and the other labour and social welfare laws) is thereby involved; in no circumstances may coercion be exercised against any person.

28. A change of employer shall not affect an existing contract of employment. For a period not exceeding six months the former employer shall be jointly liable with the new employer for contractual or statutory obligations originating prior to the date of the change; on the expiry of this period liability shall rest solely with the new employer.

29. In the absence of any written stipulation the terms of the contract shall be deemed to be those laid down by law, and in the absence of any statutory terms shall be deemed to be those established by local usage and custom for the type and category of work or services in question.

30. The responsibility for the absence of a written contract as required by this Code shall be attributable to the employer. If an employer fails to make a written contract or does not comply with any of the requisite formalities, it shall be assumed in the event of a dispute that the conditions of employment claimed by the worker are correct, without prejudice to any proof to the contrary.

Chapter II. Capacity to Make Contracts

31. Any person who has reached the age of 16 years shall have capacity to make an individual contract of employment.

32. Persons under the age of 14 years and persons who have reached this age but are still legally required to attend school shall not be employed in any kind of work.

The authorities responsible for supervising the work of such young persons may grant permission for them to be employed, if they consider that such employment is essential to the subsistence of the young persons themselves, their parents or their brothers or sisters, and the young persons are not thereby prevented from satisfying the minimum requirements of compulsory education.

In the case of persons under 16 years of age the hours of work shall fall during the day-time and shall not exceed six a day and 36 a week in any kind of work.

33. Any person under the age of 16 years shall require written permission from his legal representative or, where there is no legal representative, from a labour inspector. Where there is no labour inspector, the permission shall be given by the chairman of the district council or the mayor of the municipality in whose sphere of jurisdiction the contract is to take effect, without prejudice to the provisions of the Young Persons Act.

Such permission shall be given if the official is of the opinion that the young person will not suffer any obvious physical or moral harm by engaging in the occupation in question.

Once permission has been given, the young person may receive his wages directly and, where necessary, institute legal proceedings for the purpose.

34. If an employment relationship is established with a young person otherwise than in accordance with the preceding section, the presumed employer shall be bound to fulfil all the obligations arising out of the contract: Provided that the appropriate labour official shall have power, either on his own initiative or at the request of the party concerned, to order the relationship to cease and impose a fine on the employer.

35. Apart from young persons, as prescribed in section 33, insolvent and bankrupt persons shall also have capacity to make contracts in connection with their work.

The capacity referred to in the preceding paragraph shall apply only for the purposes of employment and shall accordingly not affect the status of the young person or the disability of the insolvent or bankrupt person in any other respect.

The fact that an employer has been declared to be under legal disability shall not invalidate any transactions or contracts that he may have made with his workers prior to the declaration.

Chapter III. Terms and Conditions of Contracts

Written Contracts

36. Every contract of employment and every amendment thereto or extension thereof shall be made in writing, save as provided in section 39 of this Code, and shall be drawn up in as

many copies as there are parties, one copy being kept by each. The employer shall be required to conserve his copy and produce it if so requested by a labour authority.

Failure to comply with these formalities shall not invalidate the contract, but shall afford grounds for invoking the provisions of sections 30 and 41.

37. Every written contract of employment shall contain the following particulars:

(a) the full name, age, sex, civil status, trade or occupation, domicile, origin and nationality of each of the contracting parties, and the number, place and date of issue of their identity cards (where they are not required to be in possession of such cards, reference shall be made to some other authentic document, or proof of their identity shall be established by two reliable witnesses, who shall also sign the contract);

(b) the services which the worker has undertaken to perform or the nature of the work to be done, with an indication, where possible, of the features and conditions of the work;

(c) the duration of the contract or a statement to the effect that it is for an unspecified period, and an indication of the date on which work is to begin. Where the employment relationship started before the contract was prepared in writing, an indication shall also be given of the date on which the worker began to hire his services to the employer;

(d) the place or places where the services are to be performed or the work is to be done;

(e) the exact place where the worker is to live, if the services are to be performed in a place other than his usual place of residence and the employer undertakes in virtue of the contract to provide accommodation;

(f) the length of the working day and the hours of starting and finishing work;

(g) whether the work is to be done at time, job or piece rates or at two or more such rates simultaneously, depending on the requirements of the job;

(h) the wage, earnings, commission or shares in profits that the worker is to receive, and whether the remuneration is to be calculated at time or piece rates or in any other manner and the form, intervals and place of payment.

Contracts specifying that the wages are to be paid at piece rates shall indicate the quantity and quality of the materials, equipment and tools that the employer undertakes to supply, their state of repair and the time for which the worker may keep them at his disposal.

No employer may require a worker to pay any sum whatsoever in respect of the normal wear and tear or accidental

destruction of tools in connection with their use for the job done;

(i) the full names of any persons living with the worker and financially dependent on him;

(j) any benefits provided by the employer in the form of accommodation, light, fuel, food, etc., if he has undertaken to provide them, together with their estimated value;

(k) any other terms agreed between the parties;

(l) the place and date of making the contract; and

(m) the signatures of the parties. Where either party is unable to sign, the fact shall be mentioned; his fingerprint shall then be affixed to the contract and another person shall sign on his behalf.

38. The Ministry of Labour and Social Welfare shall print standard forms of contract for each category of employment.

Oral Contracts

39. A contract of employment may be made orally if it relates to—

(a) domestic service;

(b) casual or temporary employment not exceeding 60 days in length;

(c) a specific piece of work to a value not exceeding 200 lempiras, on condition that, if a time limit has been fixed for the delivery of the work, such time limit is not longer than 60 days; and

(d) agricultural and stockbreeding work, save in the case of industrial or commercial undertakings deriving from agriculture or stockbreeding.

40. Where a contract is made orally, the employer and the worker shall be in agreement on at least the following matters:

(1) the nature of the work and the place where it is to be done;

(2) the amount and form of the remuneration, i.e. whether it is payable at time, job or piece rates or in some other manner, and the intervals of payment; and

(3) the duration of the contract.

41. The existence of an individual contract of employment shall be proved by means of an appropriate document or, where there is no such document, by a presumption under section 21 or by the general forms of evidence. The witnesses may be workers in the employer's service.

42. Where a contract of employment is for the performance of services within the Republic, but at a place which is not the worker's normal place of residence, the employer shall be required to pay the worker, if he has caused him to change his place of residence in order to use his services, a reasonable sum in respect of his return travelling expenses and those of his family who were living with him and were financially dependent on him at the time when the contract was made, or shall provide the necessary means of transport. If the parties do not agree on the amount of such expenses, they shall request the appropriate labour inspector to fix the amount on their behalf. If a worker, instead of returning to his place of origin, prefers to settle at some other place, he shall be entitled to the payment by his employer of the travelling expenses, up to the amount due in respect of his return to his place of origin.

In cases covered by the preceding paragraph the employment relationship shall be deemed to start on the commencement of the outward journey.

No worker shall be entitled to his travelling expenses for the return journey if the contract is terminated through his own fault or at his own request.

If the centre of employment is more than 2 kilometres distant from the worker's normal place of residence, the employer shall also be required to pay his travelling expenses to and fro.

No employer shall be required to pay the travelling expenses referred to in the preceding paragraph if the centre of employment can only be reached over an unmetalled road.

Employment Abroad

43. Every contract of employment concluded by a Honduran worker for work or services outside the country shall be made in writing, approved by the Ministry of Labour and Social Welfare and countersigned by the consul of the country where the work or services is or are to be performed, or otherwise by the consul of a friendly nation. To be entirely valid the contract shall also comply with the following requirements:

(a) The recruiting agent or the undertaking on whose behalf he is acting shall furnish proper evidence that he or it has a duly authorised representative who is permanently resident in the capital of the Republic and who will be so resident for the entire period covered by the contract or contracts, and who has sufficient powers to settle any matters raised by the workers or their dependants in connection with the performance of the agreed provisions.

(b) Contracts for the recruitment of Honduran workers shall contain clauses covering at least the following matters: the place to which the workers are to be conveyed; the type of work

on which they are to be employed; the number of hours of work per day; the duration of the contract; the wages to be paid; the food, lodging and medical services to be provided; the manner of their conveyance; and the manner and conditions in which they are to be repatriated.

(c) The expenses incurred in conveying such workers from the place where they normally live to their place of employment abroad, including any expenses incurred in crossing frontiers or complying with migration and other similar laws, shall be borne by the employer alone.

Such expenses shall also include those incurred in connection with any persons or dependants travelling with the worker, if they have been permitted to accompany him.

(d) The recruiting agent or the undertaking on whose behalf he is acting shall deposit with a Honduran bank, to the order of the Ministry of Labour and Social Welfare, an amount of caution money to be fixed by the aforesaid Ministry, or, failing that, shall provide sufficient security to cover both the repatriation expenses of the workers and any persons or dependants permitted to accompany them and the payment of any claims made and proved before the national labour authorities, which shall enjoy exclusive competence in ordering the payment of any compensation or benefits due in this regard.

The contract shall also prove that an institution of recognised solvency in the Republic of Honduras has agreed to be jointly responsible with the agent or undertaking for the cost of repatriating the workers, and those of their dependants who have left the country with them, to their place of origin.

Repatriation shall be effected on the termination of the contract, for whatever reason, save where the workers or the persons or dependants accompanying them formally indicate their intention not to return to Honduras. Repatriation shall be to the original place of residence.

Where the workers or the persons or dependants accompanying them do not wish to return to Honduras, they shall formally state the fact in the presence of a Honduran diplomatic or consular representative.

The caution money or security shall be returned in whole or in part as soon as the recruiting agent, the undertaking on whose behalf he is acting, or their duly authorised representative proves that the commitments under all or any of the contracts and under this section have been discharged.

44. The Ministry of Labour and Social Welfare shall not approve any contracts covered by the preceding section if—

(a) the workers are under age;

(b) the workers do not afford a satisfactory guarantee that maintenance payments will be made to the persons financially dependent on them;

(c) the emigrant workers are deemed to be necessary to the national economy, in which case the Ministry of Labour and Social Welfare shall make a detailed and substantiated statement of the need; and

(d) the contracts are considered to prejudice the dignity of the Honduran workers concerned or may otherwise be detrimental to them.

45. The restrictions imposed by the two preceding sections shall not apply to qualified professional workers or technicians whose work requires very high qualifications.

Other Types of Contracts

46. An individual contract of employment may be made for—

(a) an unspecified period, where no date is indicated for its termination;

(b) a specified period, where a date is indicated for its termination or where provision is made for a particular fact or circumstance, such as the completion of a civil engineering project, which inevitably implies the termination of the employment relationship. In this second case account shall be taken of the worker's activity as such, as covered by the contract, and not of the outcome of the project; and

(c) a specified piece of work or service, where the sum paid for the worker's efforts from start to finish is calculated as a lump sum, account being taken of the outcome of the project or the results achieved by the work done.

Even where a worker receives part-payment on account in respect of the work done or to be done, an individual contract of employment shall be deemed to be made for a specified piece of work if the conditions indicated in the preceding paragraph are fulfilled.

A contract made for a specified piece of work or service shall remain in force until the piece of work or service is completed.

Where no period is specified, the duration of a contract shall be taken to be that established by custom.

47. A contract for work in an undertaking which is by nature permanent or continuous shall be deemed to have been made for an unspecified period, even where a period is specified therein, if on the expiry of the contract the cause out of which it arose or the occasion for the performance of similar or identical work or services still exists.

The period of service shall be reckoned from the date of commencement of the employment relationship, whether or not this coincides with the date on which the contract was prepared in writing.

Contracts for a specified period or piece of work shall accordingly be regarded as exceptional and may be made only in cases where the casual or temporary nature of the piece of work or service so requires.

48. Any clause in a contract of employment whereby a worker undertakes to hire his services for a period exceeding one year shall be null and void, but shall only be declared to be so if the worker so requests. The same shall apply to services requiring special technical training, where the duration of the contract is longer than five years.

Notwithstanding the foregoing, any contract made for a specified period may be expressly or tacitly renewed. It shall be deemed to have been tacitly renewed if the worker continues in the employer's service and the latter raises no objection.

Period of Probation

49. The initial period of any contract of employment shall be a period of probation, which shall not exceed 60 days; its purpose is to enable the employer to assess the worker's aptitudes, and the worker to assess the conditions of employment.

Remuneration shall be paid in respect of the period of probation and if, on its expiry, neither of the parties signifies his wish to terminate the contract, the contract shall remain in force for an unspecified period.

50. The period of probation shall be specified in writing; if it is not, the services performed shall be deemed to be governed by the general provisions of the contract of employment.

In the contracts of employment of domestic servants the first 15 days of service shall be deemed to be a period of probation.

51. Where the period of probation specified is shorter than the permissible maximum, the parties may profong it before the expiry of the period originally stipulated: Provided that the total length of the period of probation shall not exceed 60 days.

52. During the period of probation either of the parties may terminate the contract if he so desires, with or without just cause, without incurring any liability.

Workers serving a period of probation shall be entitled to all benefits, except those of notice of termination and dismissal compensation.

If a fresh contract is made within one year between the same parties and in respect of the same type of employment, the second

contract shall be deemed to be for an unspecified period; in this case no period of probation shall be served.

Chapter IV. Collective Labour Agreements

53. The expression "collective labour agreement" means any written agreement relating to conditions of employment and work entered into by an employer, a group of employers or one or more organisations of employers, on the one hand, and one or more organisations of workers, the representatives of the workers employed in one or more undertakings, or the representatives of one or more temporarily constituted groups of workers, on the other.

Any decision of a conciliation board that has been agreed to by the parties shall also be treated as a collective labour agreement.

Not more than one collective labour agreement shall apply in any undertaking. If more than one such agreement in fact exists, the date of the earliest shall be deemed to be the date of the only agreement existing for all legal purposes. The agreements made later shall be deemed to be incorporated in the earliest agreement, save as may be provided to the contrary.

54. Every person employing workers belonging to a trade union shall be required to conclude a collective agreement with the trade union, if it so requests.

If two or more trade unions exist in any undertaking, the agreement shall be made with the union having the largest number of workers for bargaining purposes; the stipulations of the agreement shall not be less favourable to the workers than those contained in the contracts in force in the undertaking.

Purpose

55. The purpose of a collective agreement is to lay down the general conditions of work in an establishment, a number of establishments or a particular economic activity.

56. The expression "general conditions of work" means all matters relating to hours of work, weekly rest, annual leave, wages, discipline, safety and health, general conditions of employment and all matters relating to the rights and duties of the parties and the services to be performed or payments made by them.

As a general rule a collective agreement may contain provisions on any matter, subject to the condition that its purpose is lawful.

A collective agreement need not, in order to be valid, contain provisions on all the various conditions of work.

A collective agreement may be concluded solely or partly for the purpose of governing apprenticeship and the employment of women and young persons.

Capacity to Contract and Manner of Proving Capacity

57. Employers entering into a contract, whether individually or jointly, shall prove their capacity to contract in accordance with the ordinary law.

The representatives of workers or employers who are not organised in occupational associations shall prove their representative status by means of the minutes of an assembly or meeting which have been signed by those present.

The representatives of a workers' or employers' organisation shall prove their capacity to contract by producing one of the following: the rules of the organisation (if such rules authorise the members of the managing committee to conclude collective agreements); documentary evidence of their appointment to office; the rules of the organisation and the minutes of the meeting authorising the conclusion of the collective agreement (if no express provision therefor is made in the rules); or documentary evidence of their appointment as representatives, which may be contained in the minutes of the meeting.

Every person signing a collective agreement must be of age.

Manner of Concluding Collective Agreements

58. Every collective agreement shall be drawn up in the form of a public or a private instrument in at least three identical copies, one for each of the parties and one for the General Directorate of Labour. The contracting parties may make such additional copies as they wish.

59. Every collective labour agreement shall indicate the full names of the parties making it, shall incorporate such stipulations of the written contracts of employment as are in keeping with its nature, and shall set forth clearly and in detail the matters, undertakings or activities and occupational categories of workers covered, and the locality, region or territory to which it relates.

Legal Effects of Collective Agreements

60. Every collective agreement shall be binding on the signatories and the persons in whose name it is concluded.

The provisions of a collective agreement shall apply to all workers in the categories concerned who are employed in the undertakings covered, unless express provision to the contrary is made in the agreement.

No employer or worker bound by a collective agreement shall conclude an individual contract of employment containing provisions contrary to those of the agreement.

No collective agreement shall contain provisions less favourable to the workers than those contained in the contracts of employment in force in the undertaking concerned.

Any provisions of an individual contract of employment that are contrary to those of the collective agreement shall be null and void and shall be deemed to be superseded *ipso jure* by the corresponding provisions of the collective agreement.

Provisions of individual contracts of employment that are more favourable to the workers shall not be deemed to be contrary to the collective agreement.

The provisions of a collective agreement shall not be deemed to be contrary to law if they are more favourable to the workers.

Statutory provisions shall invariably prevail over those of a collective agreement, and those of a collective agreement over those of individual contracts of employment, save as otherwise prescribed in the preceding paragraphs.

61. A clause whereby an employer undertakes to admit to employment only such workers as are members of a trade union may be lawfully included in a collective labour agreement. Such clause and any others granting privileges to workers who are members of a trade union shall not be applied to the detriment of workers who are not members of the contracting union and who were already employed in the undertaking when the agreement was made.

62. If, after signing a collective labour agreement, the employer ceases to be a member of the employers' organisation or group which concluded the agreement, such agreement shall continue to govern the relationships between the said employer and the union or unions to which his workers belong and by which the agreement was concluded.

63. Where a workers' union or group which was a party to a collective labour agreement is dissolved, its members shall continue working in accordance with the conditions laid down in the agreement.

Liability

64. A workers' union that has signed a collective agreement shall be liable both for the direct commitments arising out of the agreement and for the performance of any commitments devolving on members of the union, save in the statutorily or contractually prescribed cases where the agreement is merely suspended, and shall have capacity to exercise such rights and institute such pro-

ceedings as are within its own direct sphere of competence or are within the sphere of competence of any of its members. For this purpose each of the contracting parties shall set aside a sufficient sum of money as a guarantee; where no such sum is set aside, the assets of each contracting party shall be deemed to be the guarantee of its commitments.

Proceedings

65. Trade unions that are parties to a collective agreement may institute proceedings in connection with the agreement in order to secure its performance and the payment of any damages that may be due. Such proceedings may be instituted against —

I. the other trade unions that are parties to the agreement;

II. members of the other trade unions that are parties to the agreement;

III. its own members; and

IV. any other person bound by the agreement

66. Any person bound by a collective agreement may institute proceedings in connection with the agreement in order to secure its performance and the payment of any damages that may be due. Such proceedings may be instituted against other persons or trade unions bound by the agreement if the failure of the latter to discharge the agreement is to the personal detriment of the former.

67. Where proceedings in connection with a collective agreement have been instituted by any person or trade union, the other trade unions concerned in the agreement may intervene in the dispute if its solution is likely to affect the collective interests of their members.

Presumed Duration of Agreements

68. Where the duration of a collective agreement has not been expressly stipulated or is not determined by the nature of the work, the agreement shall be deemed to be made for a period of one year and thereafter from year to year.

Automatic Renewal

69. If a collective agreement contains no other stipulations to the contrary, it shall be deemed to be renewed for one year at a time, reckoned from the date indicated for its termination, unless all or any of the parties state in writing within the 60 days immediately preceding the said date that they wish to terminate it.

Denunciation

70. Where one of the parties, or both parties independently, produces or produce a written statement indicating an intention to terminate a collective labour agreement, such statement must, to be valid, be submitted in triplicate to the local labour inspector (or, where there is no such inspector, to the mayor), who shall annotate it to the effect that it has been received, and indicate the place, date and time.

The original text of the denunciation shall be transmitted by the inspector (or mayor) to the party for which it is intended; the copies shall be reserved for the General Directorate of Labour and the party denouncing the agreement.

Once notice of the denunciation of a collective agreement has been given in this way, the agreement shall continue in force until a new agreement has been signed.

Review

71. Every collective agreement shall be open to review if unforeseen and important changes occur in the normally prevailing economic situation. Where the parties do not agree on the alterations to be made in consequence of such changes, the matter shall be decided by the labour courts; pending their decision the agreement shall remain in force in its entirety.

Conclusion and Effects of Collective Covenants

72. Covenants concluded between employers and workers who are not members of a trade union shall be subject to the provisions governing collective agreements: Provided that such covenants shall apply only to the persons who have concluded them or who subsequently adhere to them.

Extension of the Effects of Collective Agreements

73. On receipt of a substantiated recommendation from the Ministry of Labour and Social Welfare, the Executive may extend the application of all or any of the provisions of a collective agreement to all the workers and employers not originally covered by it, on condition that they come within its occupational or territorial scope.

In ordering such an extension, account shall be taken of the following elements of appreciation:

(1) the need for or desirability of ensuring an adequate standard of living for the working population;

(2) the need for or desirability of ensuring that equal or uniform conditions of work prevail within a given economic sector or in similar economic sectors;

(3) the need for or desirability of ensuring that workers in similar circumstances enjoy equality of treatment and opportunity;

(4) the need for or desirability of preventing economic competition based on inequalities in the treatment accorded to the working population; and

(5) the social and economic consequences of extending the agreement.

74. The Ministry of Labour and Social Welfare shall make the aforesaid recommendation either on its own initiative or at the request of one or more organisations of workers or employers; in the recommendation it shall indicate the views of the Ministry of Economic Affairs, which shall be consulted beforehand.

If the Executive considers that the matter is worthy of consideration, it shall issue instructions for the collective agreement and the ministerial recommendation to be published in *La Gaceta* on three consecutive days and shall fix a time limit of 15 days for any employers and workers who may be affected by the recommendation to submit their arguments for or against it to the Ministry of Labour and Social Welfare in writing.

Once this time limit has expired and after considering all the relevant documents, the Executive shall issue a decision dismissing the matter or extending the collective agreement in whole or in part.

Where the matter is dismissed, it may only be reopened if a new recommendation is made, the procedure followed being that laid down in this section.

If an order is made extending a collective agreement in whole or in part, the Executive shall indicate in the order the date from which the extension will be binding on the employers and workers concerned; this date shall not be earlier than the date on which the order is published in *La Gaceta*.

75. It shall not be an obstacle to the extension of a collective agreement that collective agreements covering the undertakings or workers affected thereby already exist, if the Executive considers that they are less favourable to the workers or that the elements of appreciation mentioned in section 73 so justify.

76. Where an extension is ordered by the Executive, its duration shall be the same as that of the collective agreement itself; the necessary notice of any revisions, renewals or extensions shall be published by the Ministry of Labour and Social Welfare.

Interpretation of Collective Agreements

77. The parties may stipulate in the collective agreement that differences of interpretation are to be settled in accordance with the procedure provided for in the agreement itself, without prejudice to the function conferred by this Code on the General Inspectorate of Labour and the Ministry of Labour and Social Welfare of supervising the effect given to collective agreements.

The Ministry of Labour and Social Welfare may at any time have recourse to the mediation, conciliation and arbitration procedure prescribed in this Code if it considers that a failure to settle differences may prejudice the normal relations between employers and workers or the normal performance of work.

The provisions of this section shall not prevent any natural or artificial person whose legitimate interests are affected from instituting proceedings before a labour judge or, where there is no labour judge, before a civil judge.

Registration and Publication

78. Every collective agreement shall be registered with the General Directorate of Labour by the filing of the copy mentioned in section 58 within 15 days.

Either of the parties may be made responsible for filing the agreement. If the party made responsible fails to file the agreement, the other party shall be entitled to do so at any time by submitting its copy to the General Directorate of Labour, which shall draw up an authentic copy of the agreement, issue a certificate of registration and notify the other party.

The fact that a collective agreement has been filed shall render its performance subject to supervision by the General Directorate of Labour.

The General Directorate of Labour may object to any provision in a collective labour agreement that it considers unlawful.

79. Every employer bound by a collective agreement shall be required to post up printed or typewritten copies of the agreement at conspicuous places in the establishment or at places that are readily accessible to the workers.

80. If so requested by the General Directorate of Labour, the Ministry of Labour and Social Welfare shall order the publication of a collective agreement where this is a necessary or suitable means of ensuring that the persons concerned are notified and that the agreement is observed.

81. Every instrument prolonging, amending or terminating a collective labour agreement shall be subject to the same formalities of registration and publication as the agreement itself.

Application, Supervision and Penalties

82. The General Inspectorate of Labour shall be the administrative authority responsible for the application of every registered collective agreement and shall supervise the effect given to every such agreement, subject to the provisions of sections 83 and 84 of this Code respecting penalties and appeals.

83. Where it is duly proved that an offence has been committed in connection with a collective agreement, the General Inspectorate of Labour shall impose such penalty as is prescribed in the regulations issued for the purpose by the Ministry of Labour and Social Welfare.

84. Any person who is aggrieved by a decision of the General Inspectorate of Labour interpreting an agreement, issuing an order or imposing a penalty may appeal to the General Inspectorate for the reversal of the decision and may make a subsidiary appeal to the Ministry of Labour and Social Welfare in accordance with such of the provisions of the Code of Administrative Procedure as apply.

85. The Ministry of Labour and Social Welfare shall furnish the necessary advice, whenever its advice is requested.

86. This Code shall not apply to collective labour agreements concluded before it came into operation.

Chapter V. Rules of Employment

87. The expression "rules of employment" means any set of binding principles fixing the conditions to be observed by the employer and his workers in the performance of the work.

Such rules shall be drawn up in accordance with the provisions of the collective agreement or, where there is no collective agreement, by a joint committee of representatives of the workers and the employer. For the purposes of this chapter the technical and administrative rules laid down by the undertaking itself for the conduct of the various operations shall not be deemed to be rules of employment.

88. An employer shall be required to have rules of employment if he regularly employs more than five workers in the case of a commercial undertaking, more than ten workers in the case of an industrial undertaking, or more than 20 workers in the case of an agricultural, stockbreeding or forestry undertaking.

In the case of a multi-purpose undertaking the employer shall be required to have rules of employment if he employs more than ten workers.

89. Rules of employment shall be submitted to the Ministry of Labour and Social Welfare for approval. Such approval shall not be given unless the persons concerned have been consulted through the representatives they appoint for the purpose.

The provisions of the preceding paragraph shall also be observed in the event of any amendment or cancellation of such rules.

90. The rules of employment shall form part of the individual contract of employment of every worker employed in the establishment concerned, unless a stipulation is made to the contrary: Provided that such stipulation shall be more favourable to the worker.

91. Any provision in the rules of employment conflicting with the mandatory provisions of the law, with this Code, with the labour inspection, safety or health regulations or with the contract of employment shall be null and void.

92. In addition to containing such clauses as may be considered desirable, the rules of employment shall make provision for the following:

(1) the designation of the employer and of the establishment or workplaces covered by the rules;

(2) the conditions of admission to employment, apprenticeship and probation;

(3) casual and temporary workers;

(4) the hours of entering and leaving the establishment, the hours of beginning and ending each shift (where the work is done in shifts) and the time allowed for meals and rest breaks during the day;

(5) the place and time of beginning and ending the working day;

(6) overtime and night work (authorisation, recognition and remuneration);

(7) the statutory rest days, any additional or contractually agreed rest breaks or rest days, leave with pay and leave of absence, especially for the discharge of trade union duties or attendance at a workmate's funeral, or in the event of serious family misfortune;

(8) the various types of remuneration and the categories of work corresponding thereto, the place, day and hour of payment and the length of the pay periods;

(9) disciplinary measures and the procedure for their application. It is understood that it shall not be lawful to make any deduction from wages by way of fines, that no worker shall be suspended from work without pay either for more than eight days or unless he has been given an opportunity of

stating his case, and that no worker shall be the subject of an unfavourable report unless his fault has been duly proved. In both cases the trade union representative or, where there is no trade union representative, a representative of the workers shall be notified;

(10) the time at which and manner in which the workers are to receive the medical care provided by the employer, undergo their pre-employment and periodic medical examinations and comply with the prophylactic measures ordered by the competent authorities;

(11) the rules of conduct and the safety rules;

(12) instructions for the prevention of employment injuries and for the provision of first aid in the event of accidents;

(13) the chain of command linking the employer's representatives, departmental chiefs, foremen and supervisors;

(14) the operations not to be performed by women and young persons under 16 years of age;

(15) the special rules applicable to the various types of work, having regard to the age and sex of the workers, with the object of achieving the best possible standard of health, regularity and safety;

(16) the persons in the establishment to whom any suggested improvements or other representations are to be submitted and the manner of submitting them. It shall be stated that the worker or workers may seek the advice of their trade union;

(17) the benefits, if any, provided in addition to the statutory benefits;

(18) such other rules or instructions as are necessary, having regard to the nature of the undertaking, with the object of achieving the best possible standard of health, regularity and safety in the conduct of the work; and

(19) the publication and period of validity of the rules.

93. Any stipulation in the rules prescribing less favourable conditions for the workers than those prescribed in any law, individual contract, collective covenant or agreement or arbitration award shall be null and void, the latter being substituted therefor in so far as they are more favourable to the workers.

94. No employer may penalise a worker unless provision for the penalty has been made in the rules of employment, the collective agreement or covenant, an arbitration award or the contract of employment.

Chapter VI. Obligations of the Parties and Prohibited Acts

Obligations of Employers

95. In addition to his other obligations under this Code, the regulations made thereunder and the social welfare laws, every employer shall—

(1) pay the contractual remuneration in such manner and at such intervals and places as were agreed to in the contract or as are established by labour laws and regulations, the rules of employment or the collective agreement or, in default thereof, by custom;

(2) pay the worker the remuneration corresponding to any time for which he has not worked for reasons attributable to the employer;

(3) supply the worker in due time with such tools, appliances and materials as he requires to do the work contracted for; the articles supplied shall be of good quality and be replaced at once on losing their efficiency, unless the worker has consented to use equipment of his own;

(4) provide a safe place for the storage of the worker's appliances and tools if they have to remain in the place where the work is done; it shall not, however, be lawful for the employer to confiscate them as compensation or security or for any other reason.

An inventory of such implements and tools shall be taken whenever either party so requests;

(5) allow the worker leave of absence to discharge the civic duties prescribed by law, to attend to such serious family misfortunes as have been duly shown to exist, to discharge any necessary trade union duties or to attend a workmate's funeral, on condition that the employer or his representative is given proper notice and that in the last two cases mentioned above the number of workers so absent is not such as to prejudice the working of the undertaking: Provided that no employer shall be obliged to grant a worker more than two days' leave with pay in any calendar month on this account or more than 15 days' leave in any year on any account.

Where the trade union duties are of a permanent nature or where a worker holds public office as a result of popular election, he shall be entitled to be reinstated in his previous job with all the rights deriving from his contract of employment, if he returns to work within two years. The worker engaged to replace him shall be regarded as a temporary substitute.

Where a worker occupies an executive trade union post, he shall be granted leave of absence for such time as he holds office. It shall not be lawful for the employer to pay him any remuneration on that account. The request for the leave of absence shall be made by the trade union organisation concerned;

(6) treat the worker with due consideration, refraining from ill-treating or humiliating him by word or deed;

(7) take adequate steps to institute and maintain the best possible standards of industrial health and safety;

(8) permit and facilitate such inspection and supervision as the labour, health and administrative authorities have to carry out in the undertaking, establishment or business, and provide them with such information as they need for the purpose, if they so request in accordance with the law;

(9) take all essential measures and all measures required by law for the prevention of accidents in connection with the use of machinery, implements or materials, and maintain a supply of essential medicines and equipment so that immediate treatment can be given if an accident occurs;

(10) pay the compensation due in respect of the accidents sustained by workers in the course of or in consequence of their employment and the occupational diseases contracted by such workers in connection with their job or occupation;

(11) provide a sufficient number of seats for employees and assistants in stores, shops, pharmacies, bazaars, wine-shops, warehouses and similar establishments;

(12) make such deductions from wages by way of ordinary or extraordinary trade union dues as the trade unions concerned may request. Such trade unions shall furnish evidence that the dues in respect of which they request deductions to be made are those for which their by-laws make provision;

(13) make deductions from wages by way of ordinary contributions towards the establishment and development of co-operative societies and savings funds set up by unionised workers. Such societies and funds shall furnish evidence that the contributions in respect of which they request deductions to be made are those for which their by-laws make provision;

(14) set aside, in cases where the permanently settled population of a rural centre of employment exceeds 200 inhabitants, an area of land of not less than 5,000 square metres for the purpose of establishing public markets, buildings for municipal services and recreational centres. The foregoing shall apply only where the centre of employment is 5 kilometres or more from the nearest town or village;

(15) provide the worker with healthy accommodation and wholesome and sufficient food in cases where the contract specifies that he is to be housed and fed;

(16) where he has ten or more permanent workers in his service, submit a report to the Ministry of Labour and Social Welfare in the month of February each year; stating the total sum paid out in respect of wages during the past year and indicating for each worker his full name, approximate age, nationality, sex and occupation, the number of days worked and the wages paid to him over the same period; the above particulars shall be taken from a wage book kept for the purpose and approved by the said Ministry.

The administrative labour authorities shall give every assistance to employers in discharging their obligations under this clause, either by arranging for the requisite forms to be printed or by helping small-scale employers or employers without the necessary schooling to fill in the forms correctly, and the like.

The requirements of this clause shall not apply to domestic service;

(17) establish and maintain primary schools for the workers' children. The foregoing shall apply only to rural centres and in cases where the number of children of school age is more than 20.

The education given in such schools shall be in accordance with the curricula drawn up for state-run schools.

The remuneration of the teachers shall not be less than in state-run schools;

(18) persons employing more than 200 and less than 2,000 workers shall pay the basic expenses involved in providing technical, trade or practical training in a fitting manner in a special centre, whether in Honduras or abroad, for one of their workers or for one of their workers' children, to be chosen on the basis of his aptitudes, qualities and diligence, by the workers and the employer.

Persons employing more than 2,000 workers shall pay the expenses of three such bursaries, as specified above.

No employer may cancel a bursary unless the recipient fails his examination within one year or is guilty of reprehensible conduct. In this case the bursary shall be awarded to some other person. Recipients of bursaries who have completed their studies shall serve the employer who paid for the bursary for at least two years;

(19) make all staffing changes in accordance with the stipulations of the collective agreement. Failing such stipulations the employer shall respect the rights acquired by workers through their length of service and, all other things being equal, shall retain trade unionists in preference to non-unionists;

(20) furnish workers, in places where there are tropical or endemic diseases, with the prophylactic medicines prescribed by the local health authority;

(21) in stone-cutting works, quarries, sand pits, kilns, basalt works and cement factories, comply with the labour inspection and safety regulations issued by the Ministry of Labour and Social Welfare in connection with mining operations. Such regulations shall be displayed for the information of the workers in prominent places in the mines, galleries or headings;

(22) establish a grading system to govern all matters of promotion and other changes in the personnel employed. The basic criteria shall be the worker's ability and efficiency and, other things being equal, his length of service with the undertaking. The ability and efficiency of workers shall be assessed by bodies consisting of workers and employers or, where no agreement can be reached, by decision of the Ministry of Labour and Social Welfare;

(23) comply with any other obligations imposed by the labour laws and regulations.

Acts Prohibited to Employers

96. No employer shall—

(1) induce or require a worker to purchase consumer or any other goods from a specified establishment or person;

(2) demand or accept money or any other compensation from a worker in return for admitting him to employment or for any other concession or privilige connected with his conditions of work in general;

(3) dismiss a worker or prejudice him in any other manner on account of his trade union membership or participation in lawful trade union activities;

(4) influence the political decisions or religious convictions of a worker;

(5) deduct, withhold or set off any sum forming part of the wages and cash benefits payable to a worker without the worker's prior consent in writing in each case, without a court order or without the authority conferred by law, the contract of employment or the rules of employment;

(6) draw up black lists or schedules that are liable to limit a worker's chance of finding work or affect his reputation;

(7) make or authorise compulsory collections or subscriptions among the workers, other than those required by law;

(8) direct operations or permit operations to be directed in a state of drunkenness, under the influence of narcotic drugs

or in any other abnormal condition of a similar nature, or permit persons in such condition to be present in any workplace, undertaking, establishment or centre of employment;

(9) perform or permit any act directly or indirectly jeopardising or restricting a worker's legal rights or offending his sense of personal dignity;

(10) dismiss a worker or take any other reprisals against him with the object of preventing him from requesting the help of the authorities responsible for securing the enforcement of the labour laws;

(11) inflict any penalty not recognised by the laws and regulations in force; and

(12) order the performance of work which endangers a worker's life or health, save where such work has been expressly accepted in the terms of employment.

Obligations of Workers

97. In addition to his other obligations under this Code, the regulations made thereunder and the social welfare laws, every worker shall—

(1) do his job in person within the stipulated time, comply with the rules of employment and observe and carry out any special orders or instructions given to him by the employer or his representative, in accordance with the established channel of authority;

(2) do his job with the greatest possible efficiency, care and attention, at the agreed time, in the agreed place and subject to the agreed conditions;

(3) behave with propriety and maintain an exemplary standard of conduct while at work;

(4) give assistance, whenever it is needed, if an accident or imminent danger imperils the person or interests of the employer or any of his workmates;

(5) belong to such bodies as have been established by the labour laws and regulations;

(6) return any unused materials to the employer and maintain in good condition any appliances or implements that have been issued to him for his work, without being liable for any depreciation due to fair wear and tear, fortuitous events, *force majeure* or the poor quality or defective manufacture of the articles in question;

(7) make such suggestions to the employer or his representative as are likely to protect the lives or interests of his workmates or his employer;

(8) treat as strictly confidential any technical, commercial or manufacturing secrets connected with the articles he is directly or indirectly helping to produce, any secrets that have come to his knowledge by reason of his work and any private administrative matters which it would not be in the interests of the undertaking to reveal;

(9) comply with the precautions and health measures ordered by the competent authorities and such others as may be indicated by the employer with a view to the safety and protection of the workers and their places of employment;

(10) undergo a medical examination on applying for admission to employment or in the course of his employment if the employer so requests or if the competent authority so orders, to ensure that he is not suffering from any permanent disability or any occupational, communicable or incurable disease or any mental disturbance that might endanger the safety of his workmates or the interests of his employer;

(11) vacate any house provided by the employer within 30 days of the date of termination of his contract of employment, without any need for judicial proceedings to be taken to evict him. The foregoing shall not apply in cases where the worker finds new employment within the time limit fixed for his vacation of the house. In such cases the labour judge shall order his eviction;

(12) refrain from any action which might endanger his own safety, the safety of his workmates or other persons or the safety of the establishment, workshop or workplace; and

(13) comply with any other obligations imposed by this Code and the labour laws and regulations.

Acts Prohibited to Workers

98. No worker shall—

(1) be absent from work or leave his work during working hours without good cause or without permission from the employer;

(2) report for work in a state of drunkenness, under the influence of narcotic drugs or in any other abnormal condition of a similar nature;

(3) carry arms of any kind during working hours, except in the special cases duly authorised by law. The foregoing shall not apply to sharp or pointed instruments or sharp and pointed instruments which form part of the implements and tools used for the work;

(4) remove any tools, raw materials or finished products from the factory, workshop or establishment without the employer's permission;

(5) intentionally slow down the rate of work, unlawfully suspend activities, promote untimely stoppages of work or incite others to declare or maintain such stoppages, whether he participates in them or not;

(6) prejudice the freedom of employees to work or not to work, to join or refrain from joining a trade union, or to remain in or withdraw from a trade union;

(7) use tools or appliances supplied by the employer for a purpose other than that for which they are normally intended; and

(8) engage during working hours in political or electoral propaganda or propaganda hostile to the democratic institutions established by the Constitution, perform any act infringing the constitutional right to freedom of conscience or organise collections or subscriptions during working hours.

Chapter VII. Suspension of Contracts of Employment

99. The total or partial suspension of a contract of employment shall not imply its termination or cancel the rights and obligations of the parties thereunder in respect of reinstatement and the continuity of the contract.

A suspension may apply to all the contracts made within an undertaking or to only some of them.

100. The following shall constitute grounds for the suspension of a contract of employment, no liability being incurred by either of the parties:

(1) a shortage of raw materials or power in the undertaking, on condition that it is not attributable to the employer;

(2) *force majeure* or a fortuitous event, if its necessary, immediate and direct consequence is a suspension of work;

(3) overproduction in relation to the business possibilities of the undertaking and the conditions obtaining on the market;

(4) the impossibility of running the undertaking with a reasonable minimum of profit;

(5) lack of funds and the impossibility, duly proved by the employer, of obtaining them for the normal prosecution of work;

(6) the death or incapacity of the employer, on condition that its necessary, immediate and direct consequence is a suspension of work;

(7) an illness preventing the worker from carrying out his work;

(8) prenatal and postnatal leave, leave of absence, rest days and annual leave;

(9) the worker's detention or imprisonment by the competent authority;

(10) the employer's imprisonment or detention by the competent authority, where it necessarily and inevitably interrupts the normal prosecution of work;

(11) the worker's call-up for military service;

(12) the worker's discharge of a trade union office preventing him from engaging in his normal work;

(13) a lawful strike;

(14) a lawful lockout; and

(15) any other cause not covered by the above if it is considered reasonable by the Ministry of Labour and Social Welfare.

101. The suspension of a contract of employment shall take effect from the end of the day on which the event giving rise to it occurred, on condition that evidence of the cause is submitted to the Ministry of Labour and Social Welfare or its duly authorised representatives within three days, or 30 days before the said suspension if the event giving rise to it can be foreseen.

If the Ministry of Labour and Social Welfare does not recognise the suspension because the cause alleged does not exist or is held to be unjust, it shall declare the suspension to be null and void and the worker shall be entitled to exercise his rights under his contract of employment, the labour laws and regulations and the other relevant provisions, sole liability resting with the employer.

102. If the employer intends to suspend operations for any of the reasons specified in clauses (1), (3), (4) and (5) of section 100, he shall notify the workers affected not less than 30 days before the suspension takes effect.

If he suspends operations without giving the notice mentioned in the preceding paragraph, he shall pay the workers 30 days' wages in compensation; if he gives such notice but suspends operations before the expiry of the stipulated period, he shall pay the workers the wages due to them for the days remaining until the period expires.

The employer shall give the workers such notice in writing and shall transmit a copy thereof to the Ministry of Labour and Social Welfare, which shall immediately acknowledge its receipt; such acknowledgment shall constitute proof that notice was given by the employer. The employer shall be bound by the provisions of this section even where the suspension is recognised by the Ministry.

In cases covered by this section the Executive shall have power to take emergency measures to relieve the workers' financial situation, while not harming employer interests.

103. Notice of the resumption of work shall be given to the Ministry of Labour and Social Welfare by the employer or his

representatives or successors; the sole purpose of such notice shall be to afford valid grounds for the termination, without liability for the parties, of the contracts of any workers who fail to report for work within 30 days of the receipt of such notice in writing by the Ministry.

The Ministry shall notify the trade union or workers concerned of the resumption. To facilitate such notification the employer or his representatives or successors shall supply all relevant information on request.

The Ministry shall use every means at its disposal to notify the workers concerned of the resumption. If it fails for any reason to establish contact with any worker or workers within three days of the date on which it received the information mentioned in the preceding paragraph, it shall arrange for notice of the resumption to be published immediately by means of an announcement appearing in three consecutive issues of *La Gaceta* and some other newspaper with an adequate circulation, and in this case the period of 30 days accorded to the workers in question shall run from the date on which the announcement was first published.

104. In the case mentioned in clause (7) of section 100 a worker suffering from an illness which is not occupational in origin nor caused by an industrial accident shall be entitled to a suspension of his contract of employment for a period not exceeding six months, after which time the employer may terminate the contract without incurring liability.

Save as otherwise prescribed in special provisions or where the case is covered by the Social Insurance Law [1], the employer's only obligation shall be to grant the worker leave of absence in accordance with the following rules until he has completely recovered: Provided that such recovery shall take place within the stipulated time:

(1) after not less than three months' or more than six months' continuous employment he shall pay him half his wages for one month;

(2) after more than six months' but less than nine months' continuous employment, he shall pay him half of his wages for two months;

(3) after more than nine months' continuous employment, he shall pay him half his wages for three months; and

(4) after more than five years' continuous employment, he shall pay him 30 days' wages for every year of service.

It is understood that the provisions of section 123 shall apply in such cases and that the employer may, while the contract is suspended, engage another worker on a temporary basis, dismissing him without liability on the return of the worker whose post he has been filling.

[1] *Legislative Series*, 1957 (Hon. 4).

105. Once the six-month period mentioned in the first paragraph of the preceding section has elapsed, the employer may terminate the contract of employment but shall pay the worker the amount corresponding to the period of notice, any amount due by way of a leaving indemnity and any other amounts payable under special provisions: Provided that the employer shall not incur any liability under this section if the worker, after being questioned by the Ministry of Labour and Social Welfare, does not indicate his intention of resuming permanent employment.

106. In the case mentioned in clause (9) of section 100 the worker shall inform the employer within five days of the commencement of his detention or imprisonment and shall be required to resume his employment within two days of his release, allowance being made for any travelling time.

Failure to discharge either of these obligations or the detention of the worker for more than six months shall constitute grounds for the termination of the contract without liability for either party.

If so requested by the worker or by a person acting on his behalf, the prison governor shall furnish the necessary documents as evidence of the matters mentioned in the previous paragraph.

In such cases the rule contained in the last paragraph of section 104 shall apply.

107. In the case mentioned in clause (11) of section 100 the worker shall notify the employer and the Ministry of Labour and Social Welfare in writing within five days of beginning his military service of the reason preventing him from reporting for work. The employer shall keep the worker's position open for him until 30 days have elapsed since the completion of his military service.

Within this period of 30 days the worker may resume his employment when he wishes and the employer shall admit him as soon as he applies for reinstatement.

If so requested by the worker the commander of the unit in which he has to perform his military service shall furnish the necessary documents as evidence of the matters mentioned in the preceding paragraph.

108. In the cases of suspension mentioned in clauses (7), (8), (9), (11) and (12) of section 100 the employer may engage a temporary worker, who shall acquire all the rights of a regular worker, save that of permanency of appointment. The return of the worker who has been replaced shall terminate the temporary worker's contract without the employer incurring liability, save where the temporary worker has acquired permanent status.

109. As long as a suspension arising out of a lawful strike or lockout is in progress the appropriate chapter of this Code shall apply.

110. In cases of unwarranted dismissal the worker shall be entitled to the remuneration due in respect of any period of suspension and to the option of compensation or reinstatement in his job.

Chapter VIII. Termination of Contracts of Employment

111. The following shall constitute grounds for the termination of a contract of employment:

(1) any of those specified in the contract, if they are not contrary to law;

(2) the mutual consent of the parties;

(3) the worker's death or any physical or mental incapacity such as to prevent him from performing the contract;

(4) the worker's illness in the case mentioned in section 104;

(5) any restriction of the worker's freedom in the case mentioned in section 106;

(6) a fortuitous event or *force majeure*;

(7) a loss of confidence in the worker on the part of the employer, where the former occupies a position of management, inspection or supervision, such as that of a superintendent or foreman. The reasons for the loss of confidence must be proved to the satisfaction of the General Directorate of Labour or its representatives. If, however, the worker has been promoted from a certain post under the grading system in an undertaking where such a system exists, he shall return to that post unless there is a valid reason for his dismissal. The same shall apply where a worker who occupies a position of trust requests to return to his former post;

(8) a suspension of the activities of the undertaking for more than 120 days in the cases mentioned in clauses (1), (3), (4), (5) and (6) of section 100;

(9) the liquidation or final closure of the undertaking or establishment;

(10) the exercise of the rights conferred on the parties by sections 112 and 114;

(11) insolvency or bankruptcy;

(12) notice given by the parties; and

(13) the dissolution of the contract by order of the competent authority.

In the cases mentioned in the first seven clauses above neither of the parties shall incur liability on the termination of the contract.

In the case mentioned in clause (8) above the parties shall likewise not incur any liability, save in the event of the death or

incapacity of the employer; in that case the workers shall be entitled to payment in respect of notice.

In the case mentioned in clause (9) above the employer shall be required to follow the procedure laid down for suspension in sections 101 and 102, save where the grounds for termination are fraudulent or culpable insolvency or bankruptcy duly declared by the competent authority, in which case the employer shall also be required to pay the other benefits and compensation to which the workers are entitled.

In the case mentioned in clause (13) above the procedure followed shall be that laid down in the decision ordering the dissolution of the contract.

112. The following shall constitute valid grounds for the termination of a contract by the employer without liability on his part:

(a) deceitful conduct by the worker or the trade union that sponsored him in producing falsified recommendations or testimonials as evidence of his abilities. This ground shall cease to be valid after the worker has served for 30 days;

(b) any act of violence, abuse, assault or serious insubordination committed by the worker in the course of his work against the employer, members of the employer's family, members of the managerial or supervisory staff or other workers;

(c) any serious act of violence, abuse or assault committed by the worker outside working hours against the employer, members of the employer's family, any of the employer's representatives or associates or members of the managerial or supervisory staff, where it occurs without immediate and sufficient provocation from the other party or renders co-operation and harmony at work impossible;

(d) any wilful material damage to the buildings, works, machinery, raw materials, tools or other objects connected with the work, or any serious negligence endangering the safety of persons or property;

(e) any immoral or unlawful act committed by the worker in any workshop, establishment or workplace, on condition that such act is duly proved before the competent authority;

(f) the disclosure by the worker of any technical or trade secrets or any matters of a confidential nature to the detriment of the undertaking;

(g) any enforceable judgment sentencing the worker to a penalty for a crime or misdemeanour;

(h) the worker's absence from work without the employer's permission or without just cause for two whole consecutive days or for any three working days in the course of a month;

(i) the worker's manifest and repeated refusal to take the preventive measures or follow the procedures indicated for the avoidance of accidents or diseases, or any similar refusal, to the detriment of the employer, to obey instructions clearly given by the latter or his representative in the course of his work with a view to achieving greater efficiency or output;

(j) manifest inability or inefficiency of the worker such as to preclude the performance of the contract;

(k) the discovery that the worker is suffering from an incurable mental or communicable disease or has contracted a communicable disease which does not have to be reported or which does not involve his isolation but which he refuses to have treated even though it constitutes a danger to others; and

(l) any serious failure to comply with the special obligations or prohibitions imposed upon the worker by sections 97 and 98 or any gross negligence recognised as such in collective agreements or covenants, arbitration awards, individual contracts or rules of employment; on condition that the fact is duly proved and that the penalty is applied with due regard for the procedure laid down in the rules of employment or the collective agreement.

113. The termination of a contract of employment for any of the reasons indicated in the preceding section shall take effect as soon as the worker is informed thereof by the employer: Provided that the worker shall be entitled to submit the matter to a labour court before the expiry of the period of limitation, with the object of obtaining proof that there were valid grounds for the dismissal. If the employer fails to prove that there were such grounds, he shall pay the worker such compensation as is due to him under this Code, and also, by way of damages, such wages as the worker would have received between the date of termination of the contract and the date on which the decision of the court becomes final in accordance with the procedural provisions of this Code.

The worker may require the employer to comply with the terms of the contract and to reinstate him in conditions at least as favourable as those previously obtaining.

The worker's right to require the employer to comply with the terms of the contract shall be governed by the following rules:

(a) the worker shall have the option of exercising the aforesaid right or of demanding the compensation referred to in the first paragraph of this section;

(b) if the judge orders the worker to be reinstated, in accordance with the worker's wishes, the worker shall not be entitled to compensation for unwarranted dismissal, but shall be entitled to any wages lost between the date of his dismissal and the date of his reinstatement. In addition, if the employer refuses

to comply with the order, he shall be entitled to secure compliance through judicial channels.

114. The following shall constitute valid grounds for the termination of a contract by the worker, without notice or liability on his part, but without prejudice to his entitlement to the appropriate statutory benefits and compensation as in the case of unwarranted dismissal:

(a) deceitful conduct by the employer in connection with the conditions of work at the time of making the contract. This ground shall cease to be valid after the worker has served for 30 days;

(b) any act of violence, assault or intimidation committed by the employer against the worker or any member of his family, whether during or outside working hours, or so committed during working hours by relatives, representatives or servants of the employer with his consent or condonation;

(c) any act committed by the employer or his representative with a view to inducing the worker to commit an unlawful act or any act not in accordance with his political or religious beliefs;

(d) any serious act by the employer or his representative endangering the life or health of the worker or any member of his family;

(e) any damage to the worker's implements or tools or to those belonging to a third party, but for which the worker is responsible, where such damage is caused with intent or as a result of inexcusable negligence by the employer, any member of his family or any of his representatives;

(f) any failure by the employer to pay the worker the full wages due to him, less such deductions as are authorised by law, at the agreed or customary date and place;

(g) any transfer of the worker to a lower grade of job, or to a job at a lower rate of pay; where he was appointed to his job as a result of promotion or in consideration of his ability or length of service. The foregoing shall not apply where the worker was promoted to a job involving different duties from those performed in his previous job and where he is manifestly incompetent at his new job, in which case he may be returned to his previous job without being entitled to claim compensation. This ground shall cease to be valid after 30 days have elapsed since the transfer to the lower grade or rate of pay;

(h) the contraction of any communicable disease by the employer, any member of his family, any of his representatives, or any other employee, if the worker has to remain in immediate contact with the person in question;

(i) any failure by the employer to discharge his contractual or legal obligations;

(j) any serious failure to comply with the special obligations and prohibitions imposed on the employer by sections 95 and 96, on condition that the fact is duly proved; and

(k) any failure by the employer to comply with the industrial safety and health measures prescribed in the relevant laws and regulations.

115. The termination of a contract of employment for any of the reasons indicated in the preceding section shall take effect as soon as the employer is informed thereof by the worker: Provided that the employer shall be entitled to submit the matter to a labour court before the expiry of the period of limitation, with the object of proving that the worker abandoned his work without a valid reason. If the employer proves this fact, the worker shall, in cases where the contract was made for an unspecified period, pay him an amount corresponding to the period of notice and an amount by way of damages to be assessed at the discretion of the court. In cases where the contract was made for a specified period or for a specified piece of work, he shall only pay him an amount by way of damages.

In cases of indirect dismissal based on any of the grounds indicated in the preceding section, the worker may leave his job, while retaining his entitlement to the appropriate statutory benefits and compensation.

Chapter IX. Notice

116. Where a contract is made for an unspecified period, either of the parties may terminate it by giving notice to the other party.

A worker who has received notice of dismissal shall, during the period of notice, be allowed one day's leave of absence with pay each week to look for other work.

The period of notice shall be as follows:

(a) 24 hours, where the worker has been continuously in his employer's service for less than three months;

(b) one week, where he has served for between three and six months;

(c) two weeks, where he has served for between six months and one year;

(d) one month, where he has served for between one and two years; and

(e) two months, where he has served for more than two years.

Such notice may be waived by either of the parties on payment to the other of the amount due under section 118.

117. A party terminating a contract of employment unilaterally shall give written notice thereof in person to the other party; if the contract was made orally, he may give such notice orally in the presence of two witnesses, at the same time indicating the ground or reason for his decision. He shall not subsequently be entitled to invoke any other ground or reason.

118. A worker failing to give notice or failing to give it in the manner specified by law shall be required to pay the employer an amount equal to half his wages for the period of notice.

Where the employer fails as aforesaid, he shall be required to pay the worker an amount equal to his wages for the period of notice.

119. The period of notice shall run from the day following the date on which the notice was given.

120. If a contract of employment made for an unspecified period is terminated by unwarranted dismissal or for any of the reasons indicated in section 114 or for any other reason beyond the worker's control, the employer shall pay the worker a leaving indemnity in accordance with the following rules:

(a) an amount equal to 10 days' wages, if the worker has been continuously employed for not less than three months and not more than six months;

(b) an amount equal to 20 days' wages, if the worker has been continuously employed for more than six months but less than one year;

(c) an amount equal to one month's wages for every year of employment, if the worker has been continuously employed for more than one year. For fractions of a year the amount shall be proportionate to the period of employment;

(d) in no case shall the indemnity exceed the equivalent of eight months' wages;

(e) a leaving indemnity shall be payable even if the worker immediately transfers to the service of another employer; and

(f) a leaving indemnity shall not be payable if, on the termination of his contract, the worker is automatically entitled to a retirement or old-age pension from the State or from the Honduran Social Security Institute, and the actuarial value of the pension is equal to or more than the leaving indemnity, or if his dismissal qualifies him for benefit under the involuntary unemployment insurance scheme administered by the aforesaid Institute, or if he dies as a result of an employment injury and the employer can prove that he was insured against this risk, or if he dies from any other cause and was insured against the risk of death by the aforesaid Institute.

121. Where a worker has been engaged for a specified period in the cases recognised by law or for the period necessary for the completion of a given piece of work and is dismissed without just cause or leaves his employment for any of the reasons specified in section 114, the employer shall pay him compensation to an amount equal to the wages that he would have earned had he completed the period or piece of work; in no case, however, may the said amount exceed the amount that would have been due to him under the preceding section had he been engaged for an unspecified period.

122. If a worker leaves his employment without just cause or is dismissed for any of the reasons specified in section 112, he shall compensate the employer for any loss sustained by the latter in consequence, as assessed at the discretion of the competent labour judge, who shall also determine, with due regard for the circumstances, the manner in which the worker is to pay: Provided that the amount so assessed shall not exceed 30 days' wages.

123. The notice, leaving indemnities and compensation mentioned in the foregoing sections shall be subject to the following rules:

(a) the amounts involved shall not be liable to set-off, transfer or assignment, or to attachment in excess of 50 per cent. in payment of maintenance allowances;

(b) the compensation payable shall be assessed on the basis of the average wages earned by the worker over the last six months for which the contract was in force, or over some shorter period if it has not been in force for that length of time;

(c) the continuity of the employment shall not be deemed to be interrupted by sickness, annual leave, lawful strikes or lockouts, or any other similar event that does not involve the termination of the contract of employment under this Code; and

(d) any clause in the contract designed to interrupt the continuity of the services rendered or to be rendered shall be absolutely null and void.

124. No employer shall terminate the contract of employment of an expectant woman without proving one of the grounds specified in section 112 to the satisfaction of the competent labour judge. In this case the employment relationship shall continue until the end of the postnatal leave or until the decision ordering the termination of the contract becomes enforceable.

125. On the termination of a contract of employment the employer shall, irrespective of the grounds of termination, furnish

the worker free of charge with a written statement containing the following particulars only:

(a) the dates of starting and finishing work;

(b) the nature of the work performed; and

(c) the wages earned during the last wage period.

If the worker so desires, the statement shall also contain particulars of—

(a) his efficiency and conduct; and

(b) the reason or reasons for the termination of the contract.

126. The compensation prescribed in sections 116, 120 and 121 shall also be due in cases where the employer liquidates or closes down his business, whether voluntarily or not. In the event of insolvency, failure, bankruptcy, attachment, inheritance or other similar circumstances, any money owing to workers on such account shall enjoy special priority over all other debts, except debts in respect of maintenance allowances, and the administrator, receiver, executor or referee shall pay such credits within 30 days of their formal recognition by him or by a labour court or as soon as funds become available, if there are no funds available on the expiry of this period.

Part III. Work Subject to Special Provisions

Chapter I. Work of Women and Young Persons

127. The work of women and young persons shall be more particularly adapted to their age, state of health and level of mental and moral development.

128. Young persons under the age of 16 years and women shall not be employed on work declared to be unhealthy or dangerous by this Code, the Health Code or the health and safety regulations.

129. It shall not be lawful to employ young persons under the age of 16 years on night work or overtime. It shall likewise be unlawful to employ them in clubs, theatres, circuses, cafés, canteens, places where intoxicating liquor is consumed on the premises and bawdy houses.

130. All women and young persons shall be granted a two-hour rest in the course of every normal working day.

131. In the case of agricultural and stockbreeding undertakings it shall be lawful to employ young persons who have not yet reached the age of 16 years on day work, subject to the restrictions prescribed in sections 32 and 33 of this Code.

132. In vocational schools and social welfare and assistance institutions the work shall be adapted to the abilities and physical and mental capacities of the pupils and shall be organised for training purposes, to the exclusion of actual production.

The primary schooling to which every child is entitled shall not in any circumstances be neglected.

133. Every person employing the services of persons under the age of 16 years shall keep a register recording—

(1) each young person's age. For this purpose and for the purpose of the employment of young persons generally, the records office shall issue free copies of such certificates as may be requested;

(2) the young person's full name, domicile and address;

(3) the full name of the parents or their legal representatives, if any;

(4) the name, domicile and address of the undertaking or employer;

(5) the written permission of the parents or legal representatives of the young person, or, where there are no parents or legal representatives, the written permission of the officials referred to in section 33 of this Code. The permission shall clearly state the minimum safeguards subject to which the young person is to be employed.

Where such permission is given by the parents or legal representatives of the young person, it shall be countersigned by the competent labour inspector or, where there is no labour inspector, by the officials referred to in the first paragraph of this clause.

(6) the type of work on which the young person is to be employed;

(7) the daily hours of work;

(8) the form and amount of the remuneration payable;

(9) the date of admission to employment; and

(10) a statement certifying that the young person has finished or is finishing his compulsory schooling.

A copy of this register shall be sent each month to the labour inspector, who shall demand the production of such evidence as he may deem desirable to satisfy himself that the facts recorded in the register are true.

134. It shall not be lawful to employ boys under 16 or girls who have not yet come of age on the preparation, distribution or sale of printed matter, advertisements, drawings, engravings, paintings, emblems or images which may be regarded as prejudicial to morality or decency.

135. Every expectant woman shall be granted leave, which shall be remunerated in the same way as working time, for the four weeks preceding her confinement and for the six weeks thereafter; she shall retain her job and all rights conferred by her contract of employment.

Where the remuneration is not constant, as in the case of work at piece or job rates, account shall be taken of the average remuneration earned by the woman worker over her last year of service, or over her whole period of service if she has worked for less than one year.

For the purposes of the leave referred to in this section, a woman worker shall furnish her employer with a medical certificate, which shall indicate—

(a) the fact that she is pregnant;

(b) the probable date of her confinement; and

(c) the date of commencement of the leave, having regard to the fact that it must begin at least four weeks before the confinement.

Every medical practitioner working for the State or for a state institution in return for remuneration shall be required to issue such certificate free of charge; on presentation of the certificate the employer shall give an acknowledgment of receipt for all legal purposes.

136. The employer shall pay the difference between the maternity allowance granted by the Honduran Social Security Institute and the remuneration due to the woman worker during pregnancy in accordance with the preceding section.

Where the Honduran Social Security Institute is not required to grant a maternity allowance, the entire sum mentioned in this section shall be paid by the employer.

137. Where a woman worker has a miscarriage or gives birth to a premature stillborn child, she shall be entitled to between two and four weeks' leave, which shall be remunerated at the rate she earned at the commencement of the leave. In the case of live births the provisions of section 135 shall apply.

To be granted the leave referred to in this section a woman worker shall furnish her employer with a medical certificate indicating—

(a) that she has had a miscarriage or premature confinement, the date of the miscarriage or confinement being stated; and

(b) the length of time for which she needs to rest.

In this case or whenever a woman worker is absent from her work for longer than the allotted time on account of sickness which is shown by a medical certificate to be due to pregnancy or confinement and which renders her incapable of work, she shall

likewise be entitled to the privileges conferred in connection with prenatal and postnatal leave for such time as is necessary for her recovery, subject to a maximum of three months.

Such privileges shall not be granted in cases of criminal abortion.

138. Where a woman is absent from her work for longer than three months on account of sickness which is shown by a medical certificate to be due to pregnancy or confinement and which renders her incapable of work, she shall be granted leave for such time as is necessary for her recovery; save as may be otherwise agreed, she shall not be entitled to remuneration during such leave, but shall retain her job and all rights conferred by her contract of employment.

139. The grant of maternity allowances to a woman worker during the periods immediately before and after her confinement shall be subject to her resting during that time and may be suspended if the General Inspectorate of Labour or its representatives establish at the employer's request that she is engaged in other remunerated work (except housework compatible with her state of health).

140. An employer shall be required to grant a woman worker two breaks of 30 minutes each during the day, one in the morning and the other in the afternoon, to enable her to feed her child; no deductions of any kind shall be made from her wage on this account for such time as the child is less than six months old.

This right shall be exercised by the mother at such times as she deems fit, without any other formality than that of informing the person in charge of the work of the times that she has chosen.

The employer shall be required to grant other rest periods, in addition to those prescribed in the preceding paragraphs, if the woman worker furnishes a medical certificate indicating the reason therefor.

In discharge of his obligations under this section the employer shall arrange for a nursing room (or some other suitable place where the child can be kept) to be available near the place where the nursing mother is employed.

The facilities referred to in the preceding paragraph may be provided by the child welfare authorities, under a contract made with the employer.

141. The remuneration due in respect of the compulsory leave shall be fixed on the basis of the average remuneration earned over the last 180 days (or over some shorter period if the woman worker has not been employed for that length of time), reckoned from the date on which she ceases work. The remuneration due in respect of the daily nursing breaks shall be fixed by

dividing the remuneration earned over the appropriate pay period by the number of hours actually worked, which gives the rate to be applied. Where the remuneration is not constant, the rule laid down for compulsory prenatal and postnatal leave shall be observed.

142. Every person employing more than 20 women workers shall be required to provide suitable premises where mothers can safely feed such of their children as are under 3 years old and where they can leave them during working hours under the supervision of a trained person appointed and remunerated by the employer. Such premises shall be simple and such as the employer can afford in the opinion of the General Inspectorate of Labour, whose approval shall be required.

143. In calculating the number of women workers for the purposes of the preceding section, account shall be taken of the total number of such workers employed in a given undertaking, even where they work in separate establishments or premises in a given place.

144. No woman worker may be dismissed on the ground that she is expecting or nursing a child.

There shall be a presumption that a woman worker has been dismissed on the ground that she is expecting or nursing a child if the dismissal takes place during her pregnancy or the three months following her confinement and the permission mentioned in the following section has not been obtained.

A woman worker who is dismissed without permission from the competent authority shall be entitled to the payment of compensation equal to 60 days' pay, in addition to any compensation and benefits due under the contract of employment, and also to payment in respect of the ten weeks of paid leave referred to in this chapter if she has not already taken it.

145. To dismiss a woman worker during her pregnancy or the three months following her confinement an employer shall require the permission of the labour inspector (or the mayor in places where there is no labour inspector).

The permission referred to in this section shall be granted only on one of the grounds entitling the employer to terminate the contract of employment, as indicated in section 112.

The fact that the output of a woman worker has decreased by reason of her pregnancy shall not be a valid ground for her dismissal.

Before making a decision, the competent official shall hear the woman worker and take all relevant evidence requested by the parties. If the request for permission to dismiss the woman worker is examined by the mayor, his decision shall be provisional and subject to review by the labour inspector in the nearest town.

146. Where an employer fails to grant the paid leave referred to in sections 135 and 137, the woman worker concerned shall be entitled by way of compensation to twice the remuneration due for any leave not granted.

147. It shall not be lawful to employ an expectant woman on work requiring considerable exertion. It shall likewise be unlawful to employ an expectant woman on night work for longer than five hours.

148. Any citizen may report a contravention of the provisions in this Code and the regulations made thereunder as to the protection of women and young persons.

Chapter II. Work of Domestic Servants

149. The expression " domestic service " means service performed for any person in return for remuneration, where the said person does not intend the work to be a source of profit but merely seeks to use the worker's services in his house on a continuous basis for himself alone or for the members of his family, whether the domestic servant is accommodated in the employer's house or elsewhere.

All matters not provided for in the contract shall be governed by local custom.

150. The expression " domestic servant " means any person normally and continuously engaged in cleaning, assistance and other work connected with a household or other place of residence or private dwelling.

151. Domestic service includes the work of housekeepers, nurses, cooks, governesses, private chauffeurs, servants, nursemaids and washer-women and other similar work.

152. Persons employed in domestic service in industrial, commercial, social and other similar undertakings shall be regarded as manual workers; they shall have the rights conferred on manual workers and shall be subject to the general provisions of this Code.

153. In the absence of proof to the contrary it shall be assumed that the remuneration of domestic servants includes the provision of accommodation and of food of normal quality in addition to the payment of a money wage.

154. The work of domestic servants shall not be subject to the provisions governing rest days and public or national holidays; such persons shall, however, enjoy ten hours of complete rest every day, of which not less than eight shall be consecutive hours

of the night and two for the taking of meals. On the public or national holidays prescribed in this Code such persons shall be granted an additional six hours' rest and shall be entitled to one day's rest with pay for every six days' work.

155. Every employer shall give the domestic servants in his employment an opportunity to attend night school.

156. Domestic servants shall also be entitled to leave with pay in the same way as all other workers.

157. Before making the contract and as an essential condition of the contract, the employer may require the production of a health certificate issued in the course of the last 30 days by a medical practitioner employed by the Honduran Social Security Institute, the General Directorate of Health or any of their subordinate authorities or by a medical practitioner working for the State or for a state institution in return for remuneration. Such certificate shall be issued free of charge. Where there is no such medical practitioner, a health certificate issued by any registered medical practitioner may be produced.

158. The first 15 days of domestic service shall be deemed to be a period of probation, and either of the parties may terminate the service of his own volition, subject to 24 hours' verbal notice, which shall be assumed to have been given in the absence of proof to the contrary.

After the period of probation has expired, the contract may not be terminated unless seven days' notice has been given (or one month's notice if the worker has been employed continuously for longer than one year). In such cases appropriate compensation may be paid in lieu of notice.

159. Notwithstanding the provisions of the second paragraph of the preceding section, the employer may terminate the contract without notice, subject only to his paying the domestic servant for the number of days worked, if the latter abandons his employment, is dishonest or immoral, illtreats or is disrespectful to the persons living in the employer's household or neglects his duties or if there is any other ground on which the employer is justified in terminating the contract of employment.

160. The domestic servant shall be entitled to terminate the contract and demand the payment of one month's wages if the employer or any person living in the employer's household illtreats him or incites him to commit a criminal or immoral act. Apart from cases in which any of the normal grounds apply, he shall likewise be entitled to terminate the contract if the employer fails to pay the wages due to him, in which case he shall have the right

to seven days' wages in compensation if he has completed less than one year's service, and to one month's wages in compensation if he has been employed for one year or more.

161. The compensation and payment in respect of notice to which the domestic servant is entitled shall be calculated on the basis of his cash remuneration only.

162. Any communicable disease contracted by the employer or any of the persons living in the household where the domestic servant is employed shall entitle the latter to terminate his contract without notice or liability.

The same right shall be enjoyed by the employer, save where the disease has been contracted by the domestic servant through direct contact with the employer or the persons living in the household. In such cases the worker shall be entitled to leave of absence until he has fully recovered, to assistance while he is ill and to the payment of his full wages.

163. Whenever a domestic servant is ill (in cases other than minor illnesses) and is incapacitated for work for longer than one week, the employer shall be entitled, if he does not avail himself of section 104, to terminate the contract on the expiry of this time limit, without any other obligation than to pay the worker one month's wages for every year of continuous service or any fraction of a year exceeding three months. Such compensation shall not exceed an amount corresponding to four months' wages.

164. Where, in the event of sickness, a domestic servant needs to be admitted to hospital or placed in isolation, the employer shall make the necessary arrangements with the nearest hospital or voluntary institution, shall pay any reasonable expenses incurred in connection with transport and other emergency measures and shall immediately notify the domestic servant's next-of-kin.

If a domestic servant dies in his employer's house as a result of illness, the employer shall pay any reasonable funeral expenses.

165. On the employer's death, the contract shall subsist with any of the employer's relations who were living in his household and continue to live there after his death.

Chapter III. Homeworkers

166. The expression "homeworker" means any person who manufactures articles in his own home or in some other place of his own choosing without being subject to the immediate supervision or direction of the employer or his representative.

The sale of materials by the employer to the worker in order that the latter may manufacture specified articles therefrom and sell them in his turn to the employer or any other similar instance of evasion shall constitute a contract for home work and shall be subject to the provisions of this Code.

167. Every employer engaging the services of one or more homeworkers shall, in addition to notifying the Ministry of Labour and Social Welfare of the fact without delay, maintain a register duly stamped and approved by the competent department of the Ministry or by the mayor, indicating—

(a) the full names and addresses of the said workers;

(b) the address of the place where the work is done;

(c) the amount and nature of the work given out on each occasion, with a statement of the quantity, quality and price of the raw materials supplied;

(d) the date on which the said materials were issued to each of the workers concerned and the date on which the latter are to return the manufactured articles;

(e) the form and amount of the remuneration or wage due; and

(f) the grounds or reasons for any reduction or suspension of the work.

In addition he shall arrange for vouchers to be printed in duplicate, for signature by the worker when he receives any materials which have to be supplied to him or any wages due, or for signature by the employer and transmission to the worker when the latter hands in any manufactured articles. In all such cases the relevant details of the transactions or persons shall be given.

168. The employer shall furnish each homeworker engaged by him with a wage book free of charge; this book shall be stamped and approved in the same way as the register mentioned in the preceding section. It shall, in addition to the particulars required by the preceding section, contain a record of any wages or advances paid.

169. Any defective work or manifest deterioration of materials shall entitle the employer to deduct not more than one-tenth of the wages payable to the homeworker, pending discussion of the case and the allocation of responsibility.

170. The remuneration of homeworkers shall be paid when the work is handed in, or at intervals not exceeding one week. In no case shall the remuneration be less than that paid for the same work in the same locality or than the wages that the workers concerned would have earned in the workshop or factory of an employer.

Any employer contravening this provision shall be ordered to pay each homeworker compensation equal to twice the wages that have not been paid.

171. Family workshops, small-scale industries and home work shall be subject to supervision by the labour and health inspectors; all the relevant safety, health and hygiene regulations shall be observed.

172. Every person employing homeworkers shall be required to furnish the labour authorities with such reports as they request, especially in connection with the conditions of work and the wage rates paid to the persons in his employment.

Chapter IV. Work of Apprentices

173. The expression "contract of apprenticeship" means any contract whereby an employer undertakes to give practical training to a worker, or to cause such training to be given, in any occupation, craft or trade, while using the services of the trainee for a specified period in return for remuneration, which may be less than the minimum wage.

174. The expression "apprentice" means any person undertaking to work for an employer in return for practical training which the employer gives or causes to be given in an occupation, craft or trade and for an agreed remuneration, which may be less than the minimum wage.

175. Capacity to make a contract of apprenticeship shall be governed by Chapter II of Part II of this Code.

176. Every contract of apprenticeship shall contain at least the following particulars:

(a) the full name, occupation and domicile of the employer or principal;

(b) the full name, age and domicile of the apprentice;

(c) the occupation, craft or trade which is the subject of the apprenticeship, and the services to be performed by the apprentice;

(d) the time and place of the instruction;

(e) the remuneration payable to the apprentice in the form of wages and other benefits, the rates at which the said remuneration is to be increased in the course of the apprenticeship, details of the board and lodging (where the cost is borne by the employer or principal) and the cash value thereof; and

(f) the amount of time that the apprentice may devote to training outside the workshop.

177. Every contract of apprenticeship shall be made in writing; if a contract is not so made, the services performed shall be deemed to be subject to the provisions governing contracts of employment.

178. No contract of apprenticeship shall be made for more than one year, unless the appropriate labour authority gives written permission for the period to be extended; in no case shall the duration of the apprenticeship exceed three years.

If a contract of apprenticeship is terminated for reasons not attributable to the apprentice before the expiry of the periods specified in the preceding paragraph, the Ministry of Labour and Social Welfare shall endeavour to place the apprentice in another vacancy where he can receive the same or similar training.

Where a new contract of apprenticeship is made, due account shall be taken of the period of apprenticeship already served.

The General Inspectorate of Labour shall ensure that no contract of apprenticeship lasts longer than it deems to be necessary, having regard to the age of the apprentice, the type and method of training and the nature of the work.

179. On the termination of a contract of apprenticeship the employer shall give the apprentice a certificate testifying that he has been trained in a particular occupation, craft or trade.

If the employer refuses to issue such certificate, the General Inspectorate of Labour shall, if so requested by the apprentice, arrange for him to undergo a proficiency examination at one of the state trade schools, or, where there is no such school, an examination given by a board of workers skilled in the occupation, craft or trade in question; a primary schoolteacher shall assist the board in conducting the examination.

If the apprentice passes the examination, the employer shall issue the certificate within the next 24 hours.

No remuneration shall be paid in respect of the examinations referred to in this section.

180. In addition to his obligations under section 95, the employer shall have the following special obligations towards the apprentice:

(1) to train the apprentice in the occupation, craft or trade in which he has undertaken to instruct him, without employing him on unrelated jobs that may detract from the apprenticeship;

(2) to inform the parents or legal representatives of any apprentice who is under age of any instances of illness or bad conduct or any other matters of importance concerning the apprentice;

(3) on the termination of the apprenticeship, to give preference to the apprentice, all other things being equal, in filling any vacancy that may occur in the occupation, craft or trade that he has learned;

(4) to arrange for such general education as is compatible with the apprentice's training in his chosen occupation, craft or trade, more particularly by arranging for him to attend technical schools connected with the occupation. Where the apprentice cannot read or write, the employer shall, in places without a night school, allow him two hours off each day to enable him to attend a suitable school; and

(5) to issue the apprentice with a certificate on the termination of his apprenticeship, indicating the duration of the instruction given and the knowledge and experience acquired.

181. In addition to the obligations prescribed for every worker in section 97, the apprentice shall have the following special obligations:

(1) to perform the agreed services in person and with all diligence and care and to comply with all orders, instructions and directions given by the employer or principal;

(2) to be loyal and respectful towards the employer or principal, the members of his family, and the employees and clients of the establishment;

(3) to maintain strict secrecy with respect to the private life of the employer or principal, the members of his family and his employees; and

(4) to cause no unnecessary expense to the employer or principal in the performance of his work.

182. There shall be a period of probation not exceeding 60 days in length to determine whether the apprentice is physically and mentally fitted for the occupation; if so, the apprenticeship shall run for the agreed time or for such time as is necessary.

183. In addition to the general grounds on which an employer is entitled to terminate a contract of employment, any employer may dismiss an apprentice without incurring liability if—

(1) the apprentice fails to discharge his obligations under section 181; or

(2) the apprentice proves during the period of probation to be manifestly unfitted for the occupation, craft or trade or is patently lacking in diligence in the course of his apprenticeship.

184. An apprentice shall be justified in leaving his employment without notice if the employer or principal fails to discharge his obligations under section 180 or if the employer or any member of the employer's family tries to induce him to commit an unlawful or indecent act.

In cases covered by the preceding paragraph or in cases of unwarranted dismissal the apprentice shall be entitled to one month's wages in compensation.

185. Either of the parties may terminate the contract by giving seven days' notice. The employer may dispense with such notice on payment of the remuneration for the corresponding period.

186. All employers and workers shall be under an obligation to admit apprentices for training in their undertakings; the number of apprentices so admitted shall be at least 5 per cent. of the total number of workers engaged in each occupation or trade in the undertaking concerned.

Where there are less than 20 workers in a given trade, there may be one apprentice notwithstanding.

The children of the workers employed in a given undertaking shall have a prior claim to employment as apprentices in that undertaking.

187. If the employer cannot himself direct the work of an apprentice, he shall designate a person to act as the principal.

188. Employment and training in reformatories and approved vocational schools and schools of arts and crafts shall be governed by special provisions.

189. Industrial undertakings shall be required to set up apprentice training schools for their particular spheres of activity, with the object of promoting workers' education among the children of their employees.

The Ministry of Labour and Social Welfare shall issue regulations in connection with this obligation; account shall be taken of the financial resources of the undertakings concerned.

190. An apprentice shall enjoy all the benefits and be subject to all the obligations instituted by a contract of employment, save only that he shall not be covered by minimum wage legislation.

For all legal purposes the contract shall be deemed to run from the commencement of the apprenticeship.

Regulations governing contracts of apprenticeship shall be made by the Executive after considering a report from the workers' and employers' organisations or undertakings particularly concerned.

Chapter V. Agricultural, Stockbreeding and Forestry Workers

191. All operations carried out in the countryside in connection with crop-growing, land development, stockbreeding or forestry shall be deemed to be agricultural work.

Work of an industrial character, even where it is related to agriculture, shall be excluded.

In case of doubt, a ruling on the description of the work shall be given by the local labour inspector or his representative. An appeal against the labour inspector's ruling may be lodged with his superior.

192. All natural or artificial persons engaged in the cultivation on their own account of land that is their property or the property of others, as tenants, usufructuaries, etc., whether they manage their farms themselves or do so through agents or managers, shall be deemed to be agricultural employers.

193. All persons who, in an agricultural or stockbreeding undertaking, perform tasks peculiar to such undertakings and commonly performed therein shall be deemed to be agricultural or stockbreeding workers.

The foregoing definition shall not include managers, overseers, bookkeepers or other salaried employees belonging to the administrative staff of the undertaking.

194. The employment of agricultural workers shall be governed by the general provisions applicable to individual contracts of employment in so far as such provisions are not incompatible with agricultural work or with the provisions of this Chapter.

Where no hours are fixed for agricultural work, such work shall not be subject to any limitation of time, and the hours to be worked shall be determined by the nature of the work, by conditions in the area or by custom.

195. Every agricultural, stockbreeding and forestry undertaking regularly employing more than ten workers shall be required to provide them with suitable accommodation, set aside premises for the care of the sick and supply such medicines and other medical requisites as may be needed in an emergency.

196. Every agricultural, stockbreeding and forestry undertaking shall take preventive action to eradicate tropical diseases.

197. The Ministry of Labour and Social Welfare and the Ministry of Public Health and Social Assistance shall take the requisite steps for the implementation of the last two foregoing sections.

198. Every agricultural, stockbreeding and forestry undertaking where there are 20 or more children of school age whose parents are workers employed in such undertaking shall provide suitable premises for setting up a school.

199. Where women or young persons are employed in agricultural or stockbreeding work with the employer's consent, they shall be deemed to be agricultural workers, even if such work is

regarded as ancillary or complementary to that done by the head of the family as an agricultural worker. Such agricultural workers shall accordingly be deemed to be bound to the employer by a contract of employment.

200. Wages shall be paid at intervals not exceeding one week.

201. No agricultural labourer shall build or plant on the land of the farm without the employer's permission.

202. Where, at harvest time, there is a likelihood of danger or considerable losses, the workers shall work even on rest days and outside normal working hours, subject to the payment of the statutory wage increases.

203. Where work is done on what is generally referred to as a "task" basis, the labour inspector may reduce such tasks to a reasonable limit if there are reasons for so doing.

204. Hours of work, compulsory rest periods, leave, remuneration and the rights and duties of employers and workers shall be governed by the general provisions on the subject.

Chapter VI. Transport Work

205. The expression "transport worker" means any person employed on vehicles used for the transport of passengers or goods, or both.

206. The provisions of this Chapter cover all private, state and municipal undertakings and apply to all wage and salary earning transport workers and to all drivers employed by the State, by any municipality or diplomatic or consular representative or by any owner using his vehicle without a view to profit.

207. Every transport worker shall be provided with a booklet issued by the undertaking or owner of the vehicle. Such booklet shall contain—

(1). the worker's full name and age;

(2) the name of the undertaking or owner of the vehicle;

(3) his nationality and domicile;

(4) his date of entering and leaving the employment;

(5) his wage or salary;

(6) his job and the type and number of the vehicle; and

(7) the signatures of the employer and the worker.

208. In addition every driver shall hold the necessary driving licence issued by the appropriate traffic authority and a certificate

to the effect that he has furnished the security required by law of every vehicle driver.

209. No undertaking or owner shall employ a worker if he is not in possession of the booklet, licence and certificate referred to in the last two foregoing sections.

210. In addition to the general grounds prescribed in this Code an employer shall be entitled to dismiss a driver for failure to observe the traffic rules or such special rules of the undertaking as have been legally approved.

211. No worker who is engaged to work at a specified and fixed place shall be compelled to move to some other place, save in accordance with the rules laid down in this Code.

212. The contract need not specify the exact duration of the journey for which the worker is employed; it shall be sufficient for the geographical destination of the journey to be indicated. No driver shall be required to cover more than 400 kilometres a day.

213. Having regard to the nature of the work, a transport worker may be employed for more than eight hours a day, on condition that rosters are established in accordance with the requirements of the service, Sundays, Saturday afternoons and public holidays being included as working days.

In no circumstances shall the total number of hours worked exceed 44 a week in the case of day work or 36 in the case of night work.

214. Any time worked in excess of what is deemed in this Code to constitute a normal day's work shall be regarded as overtime for the purpose of remuneration.

215. Hours worked as a result of taking the wrong road or in consequence of an accident for which the worker is responsible shall not be regarded as overtime.

The employer shall not be liable for overtime worked as a result of *force majeure* or a fortuitous event.

216. No transport worker shall take on goods or passengers at any place other than those appointed for the purpose by the undertaking. Any breach of this section shall be sufficient cause for the worker's dismissal.

217. Every transport undertaking shall establish a grading system for its workers, and their advancement shall be governed strictly by length of service and merit.

218. In the event of a strike the appropriate labour inspector shall, where such action is required by the importance and urgency of the service, decide how many workers are to remain on duty.

219. For the better application of the principles and provisions of this Code to transport undertakings, the Executive shall, by orders issued through the Ministry of Labour and Social Welfare, make such regulations as it deems appropriate, in accordance with the following principles:

(a) such regulations may be applicable to the whole territory of the Republic, to a single branch of transport or to a specified undertaking; in any event they shall be issued only after prior consultation with any employers and workers concerned; and

(b) in issuing such regulations due attention shall be paid to the need to avoid a break in the continuity of the services provided by the undertakings concerned, the safety which such undertakings have to guarantee the public and the rights of the workers.

Chapter VII. Work at Sea and on Inland Waterways

220. The complement of a vessel shall comprise the master, the officers of the deck and engine-room departments, the supercargoes and pursers, the seamen, and any persons employed on board the vessel in any capacity, with the exception of the following:

(1) persons working exclusively on their own account;

(2) persons whose work is solely connected with the cargo on board and who are not actually employed by either the shipowner or the master;

(3) dockworkers travelling from port to port; and

(4) articled apprentices and trainees in receipt of grants.

221. For all legal purposes the master of the vessel shall be regarded as the employer's representative, unless he is himself the employer; he shall also have such authority and powers as are conferred upon him by ordinary law.

222. Contracts of employment with the crew may be made

(1) for a specified period, for an unspecified period or for a particular voyage; and

(2) on the basis of a share in the freight or profits.

A contract made for a particular voyage shall cover the entire period from the time when the crew member goes on board until the vessel has finished unloading on the conclusion of the return voyage to its home port: Provided that the contract may expressly state that it is to end in some other port. The vessel's home port

shall be understood to be that indicated in the contract; if no port is so indicated, it shall be the Honduran port where the shipowner or employer has his head office and, in case of doubt, the port of registry.

A contract made for a specified or unspecified period shall indicate the port to which the crew member is to be repatriated; if no such indication is given, it shall be presumed that the said port is the crew member's port of embarkation.

In the case of a contract made for an unspecified period, the temporary docking of the vessel shall not involve the termination of the contract, but shall merely suspend its effects until the vessel returns to service. Repairs shall not be regarded as an instance of the temporary docking of the vessel.

223. Before terminating a contract, the employer shall always repatriate the crew member concerned to the place or port indicated for each type of contract in the preceding section. No exception shall be made in the event of shipwreck, but an exception may be made in the event of the imprisonment of the worker for an offence committed on foreign soil and in other similar cases where it is absolutely impossible to comply with the above requirement.

224. If a Honduran vessel changes its nationality or is lost through shipwreck, all the contracts of employment made in connection with it shall be deemed to have been terminated as soon as the obligation referred to in the preceding section has been discharged and the earning due to crew members up to the time of their disembarkation have been paid. In the first case crew members shall be entitled to three months' wages, unless the statutory compensation is higher, and in the second case they shall be entitled to the equivalent of two months' wages, unless they are entitled by law or custom to claim a larger sum.

225. Crew members engaged for a particular voyage shall be entitled to a proportionate increase in their wages if the voyage is prolonged or delayed, unless such prolongation or delay is due to *force majeure*.

Wages shall not be reduced if the voyage is curtailed, irrespective of the cause.

226. The parties shall not be permitted to terminate a contract of employment, even for a valid reason, as long as the vessel is on a voyage. The vessel shall be deemed to be on a voyage when it is at sea or in some Honduran or foreign port other than those specified in section 222 for the purposes of the repatriation of the worker:

Provided that if, while the vessel is in any port, the master finds a substitute for a worker who wishes to leave his employment, the latter may terminate his contract in accordance with

the statutory procedure. The employer may also terminate the contract while the vessel is not in any of the ports mentioned in section 222, on condition that the worker is guaranteed his repatriation to such port and the payment of any sums to which he may be entitled under his contract of employment.

227. The fact that the master's place is taken by another person who does not afford a sufficient guarantee of safety, ability and efficient leadership or that the vessel's destination is changed when the contract has been made for a particular voyage shall also be a valid reason for a worker to terminate his contract if proof of the circumstances relating to the master is submitted to the appropriate officials and no substitute is found for him within the time limit fixed by such officials.

228. The master shall have sole power to fix the hours of work and the composition of watches in accordance with maritime practice: Provided that the competent authorities may take action to uphold any principles of social justice that are infringed.

229. The vessel with its engines, equipment, stores and cargo shall constitute security for the payment of any wages or compensation due to the workers, who shall have a prior claim in the settlement of debts.

230. Without prejudice to any legal liability he may incur, a worker wilfully leaving the vessel while it is on a voyage shall automatically forfeit any unpaid wages to which he is entitled, on condition that such wages do not exceed the amount due for one week's work. The foregoing shall not apply in cases where the master finds a substitute, as indicated in section 226.

The master shall deposit such wages with the Honduran authorities, for transmission to the Ministry of Labour and Social Welfare, which shall forward them to the appropriate seamen's union.

231. A worker who is ill through no fault of his own while the vessel is on a voyage shall be entitled to medical care at the employer's expense, whether on board the vessel or ashore, without loss of pay; once cured, he shall, on request, be entitled to repatriation to the appropriate place, as indicated in sections 222 and 223. Cases covered by the Social Insurance Law[1] or by the provisions relating to employment injuries shall be governed by that Law or by such provisions.

232. The forms of contract for seamen serving in ships engaged in international trade under the Honduran flag shall be

obtained from the General Directorate of Labour or from the Honduran consulate for the port from which the vessel sails. The contracts and names of the crew shall appear in a single document, to ensure that there are no members of the crew who have not been duly articled.

233. The contract of employment made with the members of the crew shall be drawn up in Spanish in four copies and signed by the master or whoever is acting in his stead and by the seamen in the presence of the appropriate Honduran official. One copy shall be retained by each party and one by the official in whose presence the contract was signed, and one shall be deposited with the General Directorate of Labour or sent to it by the official witnessing the contract.

The master or whoever is acting in his stead shall display a copy of the contracts for the information of the seamen in a prominent and easily accessible place.

234. It shall not be lawful for agents to take any part in the enrolment procedure.

The foregoing shall not apply to trade unions and such other non-profit-making institutions as have received permission from the General Directorate of Labour.

235. The master and other officers performing duties of a technical or professional character on board Honduran merchant vessels shall hold certificates of competency entitling them to perform such duties.

Such certificates shall be issued for a period of four years by duly authorised harbourmasters within the Republic, and otherwise by the appropriate consul; such certificates shall be renewable for a further period of four years: Provided that wireless operators' certificates shall be issued by the Director-General of Electrical Communications. Such certificates shall be issued on the basis of the diplomas or other reliable documentary evidence produced by the applicants as proof of their technical or professional competence.

The harbourmasters of Honduran ports and the consuls of the Republic in foreign ports where Honduran vessels call shall satisfy themselves that the ships' officers have appropriate certificates of competency on board.

236. Every crew member shall obtain an identity booklet as proof of his identity, nationality and occupation.

Every crew member of a Honduran merchant vessel of more than 30 tons gross tonnage shall be entitled to possess and carry on his person an identity booklet authorising him to work in Honduran merchant vessels.

Application for the booklet shall be made to the government department responsible for the Honduran merchant marine. Duly

authorised customs officers in Honduran ports and Honduran consuls in foreign ports shall have power to issue such booklets to seafarers who apply for them and furnish proof that they are entitled to possess them.

237. A crew member's identity booklet shall contain the following information:

(1) the number of the booklet;
(2) a photograph of the bearer;
(3) his fingerprint and signature;
(4) his full name, the number and place of issue of his identity card, and his date and place of birth, nationality, occupation, domicile and marital status;
(5) any distinguishing marks;
(6) the name and type of vessel in which the seaman has undertaken to work or from which he has been discharged;
(7) the place and date of his enrolment;
(8) his job on board;
(9) the place and date of making the contract;
(10) the signature of the master and of the Honduran official issuing the booklet; and
(11) the place and date of issue of the booklet.

238. The booklet shall contain a sufficient number of pages with the necessary columns left blank so that entries may be made from time to time, showing the name and nationality of the vessel in which the crew member is employed, the date and place of his enrolment, his employment on board, the date and place of his discharge, the nature of his services and the signature of the master or the agent for the vessel.

239. No person under 16 years of age shall be employed in any vessel.

The foregoing shall not apply to cadets in training ships that are approved and supervised by the Ministry of Education.

240. Every master of a Honduran vessel shall ensure that not less than 90 per cent. of the seamen on the muster roll are of Honduran nationality.

The harbourmasters of Honduran ports and the consuls of the Republic in foreign ports where Honduran merchant vessels call shall satisfy themselves that the masters, owners or agents of such vessels strictly comply with the provisions of this section.

241. Any contravention of the preceding section shall render the offender liable to the cancellation of the vessel's registration and to a fine of between 1,000 and 5,000 lempiras, which shall be

imposed by the General Inspectorate of Labour or, outside Honduras, by a consular official of the Republic.

242. The wages of a worker who dies during a voyage shall be paid in accordance with the following rules:

(1) on the basis of the number of units of time served, if the settlement would otherwise have taken that form;

(2) if the contract was made for a particular voyage, the worker shall be deemed to have earned half the agreed amount if he dies on the outward journey and the full amount if he dies on the return journey; and

(3) if the payment is by shares, the worker's full share shall be paid if he dies after the beginning of the voyage.

The employer shall be under no obligation to make any payment if death occurs before the vessel's normal date of sailing.

243. If the worker dies or is taken prisoner while defending the vessel, he shall be deemed to be present for the purpose of the earnings to which he would have been entitled under his contract until the end of the voyage or what should normally have been the end of the voyage.

244. The master of a Honduran merchant vessel shall allow the crew the necessary leave of absence to cast their votes in popular elections, on condition that such absence does not, in his opinion, endanger the safety of the vessel or prevent it from sailing at the appointed hour on the appointed day.

245. Subject to the conditions laid down in the preceding section and to the other requirements prescribed in this Code, crew members shall be allowed leave of absence to discharge trade union or civic duties.

246. An agreement concluded on board between the master of a Honduran merchant vessel and a person who has come on board unlawfully and who concludes the said agreement for the purpose of earning by his personal services the passage money which he was trying to evade shall not be deemed to be a contract of employment.

247. The owner of one or more vessels shall, as the employer, sign a contract with the crew or with the union to which most of the crew belong and shall state in the contract the name of the vessel or vessels to which the contract relates.

248. Every contract of employment made by crew members of Honduran nationality for employment in foreign vessels shall conform to the requirements of section 43.

249. Contracts providing for the payment of different wage rates for the same work shall be valid if the work is done in vessels of different kinds.

250. Where a contract is due to expire within ten days and a new voyage is planned for a longer period, any member of the crew shall be entitled to request the termination of his contract so as not to be compelled to serve on such a voyage, on condition that he gives the employer notice three days before the date of sailing.

251. The master shall grant a weekly rest, either in port or at sea, to all crew members who are not on duty, on condition that such rest does not affect the working of the vessel: Provided that crew members who are permanently on call or who cannot be granted a weekly rest owing to the nature of their work shall be paid at overtime rates for the period of the weekly rest.

252. Leave shall be reckoned from the moment of going ashore and, if the date of sailing is earlier than the end of the leave, the crew member concerned may forgo the remainder of his leave, on condition that he is allowed to take it when the vessel reaches port again. If he does not forgo the remainder of his leave, he shall be deemed to be on unpaid leave from the end of the leave until he rejoins his vessel.

253. If the crew so prefer, their wages may be paid in foreign currency, an amount equivalent to the contractual amount being handed to them when the vessel is in port or in foreign waters, or is about to enter such waters.

254. Training and drill in the avoidance of nautical hazards shall be carried out in accordance with the shipping regulations, no overtime being payable for any work so done. In such cases the master and officers shall act as representatives of the authorities and not as representatives of the employer.

255. Every employer shall provide comfortable and hygienic accommodation on board for the crew.

256. In every contract made with a crew member it shall be understood, even if not expressly stated, that the cost of remitting funds to his relatives shall be met by the employer for such time as the vessel is away from Honduras.

257. Where an employment accident occurs on board, the master shall report it to the harbourmaster's office of the next port of call within 24 hours of the occurrence.

If the vessel calls at a foreign port, the master shall submit such report to the Honduran consul or, if there is no such consul,

to the labour court of the first Honduran port of call, without prejudice to the other obligations in this respect that are provided for in this Code.

258. The safety inspection of merchant vessels shall be the exclusive responsibility of the inspectors of shipping; the labour inspectors shall confine themselves to the supervision of labour conditions while vessels are in port and in so doing shall have due regard for the shipping regulations.

259. Crew members shall be subject to the provisions as to strikes contained in this Code, save that a strike shall never be called while the vessel is under way or at anchor or moorings away from port. If a strike is called while the vessel is anchored or moored in port, all crew members shall leave the vessel: Provided that the personnel responsible for the safe custody of the vessel shall remain on board to ensure its safety and proper maintenance.

260. Where a vessel is taken to a foreign port for repairs and its condition is such that the crew cannot remain on board, the shipowner shall provide them with food and lodging. The foregoing shall also apply in a Honduran port if it is not the place where the contract was made. In neither case shall the crew be liable for any of the expenses so incurred.

261. Every contract shall specify the percentage to be paid to the crew for the salvage of another vessel.

262. In addition to the grounds listed in section 112, the following shall be valid grounds entitling the employer to terminate a contract of employment:

(a) any wilful and manifest breach or disobedience of orders given by the master in the exercise of his duties;

(b) abandonment of the watch;

(c) failure to show a proper respect for the passengers;

(d) being drunk when the vessel sails or while it is under way, or being under the influence of narcotic drugs or in any other similar abnormal condition;

(e) failure to report on board at the appointed time for sailing, or subsequent disembarkation, with the result that the voyage is missed; and

(f) any other grounds prescribed in the relevant statutory provisions, in so far as they do not conflict with this Code.

263. In addition to the grounds listed in section 114, the following shall be valid grounds entitling the worker to terminate his contract of employment:

(a) a declaration of war between Honduras and the nation to whose territory the vessel is sailing;

(b) the receipt of news from a reliable source before the voyage begins that there is an epidemic at the port where the vessel is to unload; and

(c) the occurrence of either of the circumstances referred to in section 227, or the death of the master of the vessel.

264. The provisions of this Code shall govern the relations between employers and workers in coasting vessels and seamen in vessels engaged in international trade.

Every person employed on board a vessel in any capacity shall be deemed to be a seaman, except –

(1) the master;
(2) the pilot;
(3) the officers;
(4) the ship's doctor;
(5) the sick bay or hospital staff;
(6) persons working solely on the basis of a share in profits or earnings;
(7) persons whose work is solely connected with the cargo on board and who are not actually employed by either the shipowner or the master; and
(8) dockworkers travelling from port to port.

In so far as they are not covered by this Code, the relations between employers and workers in vessels engaged in international trade or in the home trade shall be governed by the provisions of the Merchant Shipping Law and the Commercial Code.

All matters relating to hygiene on board ship and to the health and safety of the crew shall be governed by the provisions of the relevant international Conventions, the Health Code, the regulations made thereunder and the other relevant laws.

265. For the better application of the principles and provisions of this Code to employers and workers with respect to work at sea and on inland waterways, the Executive shall, by orders issued through the Ministry of Labour and Social Welfare, make such regulations under this Chapter as it deems appropriate.

Chapter VIII. Railway Work

266. Work on the railways throughout the country, whether such railways are under state or private ownership, shall be governed by the provisions of this Code.

267. The following shall be deemed to be railway workers: stationmasters, signalmen, guards, diesel locomotive drivers, goods

and ticket clerks, steam locomotive drivers, firemen, brakesmen, pointsmen, goods handling staff, locomotive and motor truck servicing staff, mechanics and assistant mechanics, workshop staff, whether skilled or not, maintenance staff, crane operators, gantrymen, trainedespatchers and, in general, all wage and salary earners directly connected with the rail transport service, whether in offices, on the track or in the yards.

268. Due attention shall be paid to physical fitness, efficiency and length of service in granting promotion to workers in accordance with their contracts of employment.

269. The hours of work shall be governed by the requirements of the service and may begin at any time of the day or night. Such hours may take the form of day work, night work or work done partly by day and partly by night.

Day work is that done between 5 a.m. and 7 p.m.

Night work is that done between 7 p.m. and 5 a.m.

Where a person's hours of work cover a period including part of the day and part of the night, the whole period shall be deemed to have been worked at night if three hours or more were worked during the night; if less than three hours were worked during the night, it shall be deemed to have been worked partly by day and partly by night.

Where night work is deemed to be done within the meaning of this section, the wage increase referred to in section 273 shall be paid in respect of the entire period; where work is deemed to be done partly by day and partly by night, the wage increase shall be paid only in respect of the period of night work.

Where the length of the working day has been extended beyond eight hours and up to the maximum permitted by this Chapter, and where three or more hours are worked at night, the increase shall be paid in respect of the eight hours of normal work and not in respect of the hours of overtime, to which in this special case the overtime rate alone shall apply. Where the number of hours worked at night is less than three, the increase in respect of night work shall be paid as in the case of work done partly by day and partly by night.

270. For the purpose of fixing the limits and length of the working day any time during which a worker remains at the disposal of the undertaking shall be regarded as actual work. Where a worker cannot leave his place of work during his breaks for rest or meals, the time so spent shall likewise be regarded as actual work.

Any time during which a worker remains idle for reasons beyond his control after the hour at which he is required to report for work in accordance with the timetables drawn up by the undertaking or, in the case of work not governed by a regular timetable,

in accordance with orders received shall be regarded as actual working time.

Any time during which a worker does not remain at the disposal of the undertaking and can leave his place of work during his breaks for rest or meals shall not be regarded as actual working time.

271. In calculating actual working time, every hour of night work shall, for the sole purpose of fixing the maximum working hours, be reckoned as equivalent to 80 minutes. The foregoing shall apply only to time actually worked during the night and not to time worked during the day but regarded as night work within the meaning of this Code.

272. The normal hours of work shall be deemed to be

(a) 44 a week in the case of day work and 36 a week in the case of night work;

(b) 192 a month in the case of day work and 156 a month in the case of night work; and

(c) 176 in any period of four consecutive weeks of day work and 144 in any period of four consecutive weeks of night work.

For purposes of this section hours of night work shall be calculated in the manner and at the rate specified in the preceding section for the sole purpose of maintaining the statutory relationship between hours of work by day and hours of work by night.

273. The statutory increase for every hour of work which is deemed to be done at night in accordance with the provisions of this Chapter shall be 20 per cent.

The statutory increase for every hour of work which is deemed to be overtime in accordance with this Chapter shall be 50 per cent.

Each increase shall be independent of the other and, where work is deemed to be both overtime and night work, both increases shall accordingly be calculated from, and added to, the normal daily wage rate. This paragraph shall not apply to the special case of an extended working day referred to in the last paragraph of section 269.

274. The increase in respect of night work shall be granted, where appropriate, in accordance with sections 270 and 273.

The increase in respect of overtime shall be granted in accordance with the same sections and on the basis of the following:

(a) overtime shall be deemed to be any time worked in excess of the limits fixed in section 272 of this Code;

(b) even within the limits specified in clause *(a)* above, overtime shall be deemed to be any time worked in excess of eight hours a day in the case of day work and six hours a day in the case of night work;

(c) actual working time shall not exceed an aggregate of 12 hours' normal work and overtime a day, save where a collective agreement has been concluded to the contrary with the approval of the General Directorate of Labour.

275. The following shall be deemed to be actual working time:

(a) any time spent by a worker in travelling between any point or place where he is required to report for work by order of the undertaking and the point where he is actually employed;

(b) any time spent by a worker in travelling between one point and another on the track or tracks to replace or relieve an absent worker, irrespective of the cause of the replacement or relief.

276. Wherever reference is made to actual work or actual working time, it shall be understood that the normal wage or the normal wage plus the appropriate increase is payable in respect thereof.

277. Work outside the limits specified in the foregoing provisions or in the agreements referred to in clause *(c)* of section 274 shall be permitted, subject to the payment of a 30 or 70 per cent. increase, depending on whether such work is done by day or night, in the following cases only:

(a) force majeure;

(b) a fortuitous event;

(c) an accident or the prevention of an impending accident;

(d) extremely urgent work on the machinery or plant of the undertaking;

(e) a collision or derailment, the collapse or destruction of any bridge or track, or the interruption of telephone communications along the track;

(f) cases of similar gravity to those mentioned above.

Work in the cases referred to in this section shall be limited to the strict minimum necessary to restore the service or to achieve the end in view. If the limits referred to in clause *(a)* of section 274 are exceeded by reason of any of the circumstances mentioned either above or in clause *(c)* of section 274 or in section 274 [*sic*] of this Code, the total number of hours actually worked shall not exceed 62 in any period of six days or 234 in any month.

278. Any extra time spent by a worker in correcting mistakes made during normal working hours and for which he alone is responsible shall not be deemed to be overtime: Provided that such time shall be deemed to be overtime if the worker incurs a disciplinary penalty in connection with his mistake.

279. Subject to a maximum of 12 hours a day, 62 hours a week or 234 hours a month, any undertaking may require its workers to do overtime in order to maintain a proper service, on the understanding that it shall then pay them the increases to which they are entitled.

The Executive may progressively restrict the application of this section, after consulting the undertakings and workers' organisations concerned.

280. Every undertaking shall endeavour to organise its work in such a manner that there is normally a reasonable interval between the end of one working day and the beginning of the next: Provided that such interval shall not in any circumstances amount to less than eight hours.

281. Where the interval referred to in the preceding section is less than ten hours, the normal wage payable on the following day shall be increased by 15 per cent.; this increase shall be independent of any other increases payable for any other reasons. Where the interval is ten hours or more, but less than 12 hours, the increase payable shall be 10 per cent.

282. The rest day may be fixed for any day of the week: Provided that it shall be the same for any individual worker and shall not be changed until a given day of rest has been taken three weeks running, without prejudice to the provisions of section 283 of this Code. Undertakings may employ a roster system of rest days varying from week to week, on condition that one day of rest is granted for every five days worked.

The roster system of rest days shall be arranged on the basis of tables, whereby the workers can ascertain their days of rest over a period of at least three months.

The General Directorate of Labour shall supply the tables for the roster system or the standard forms to be used for the purpose.

283. No undertaking may habitually employ its workers on their weekly rest day, but may do so by way of exception on payment of twice the wage corresponding to the number of hours worked.

An undertaking shall not be required to pay this double wage if it reaches an agreement with the worker that he is to enjoy a compensatory rest day during the same week or an additional day of annual leave for every rest day worked, as a compensation for the rest not taken, on condition that such agreement is invariably confirmed in writing.

No undertaking may employ a worker on his day of rest more than 12 times in any year, even in any of the circumstances referred to above.

284. Every undertaking that operates a railway shall strictly comply with all provisions issued for the prevention of industrial accidents and occupational diseases and shall introduce as part of its practice such measures as science, technology and experience dictate.

285. Every undertaking that operates a railway shall provide its workers free of charge with clean and comfortable accommodation when they are required by the exigencies of the service to live or spend the night in places other than their normal domicile or residence.

The accommodation provided shall consist of a bed and clean bed linen for each worker, together with a sufficient number of chairs and tables.

As far as possible a suitable place for meals shall also be provided, together with the necessary facilities.

286. In appropriate cases the undertaking shall provide sufficient food or pay each worker a sum of money in advance to cover the cost of meals.

Where it does not provide food, the undertaking shall pay each worker such sum of money as is fixed by collective agreement.

287. In the event of a strike the strikers shall be required to provide, and the employer and his representatives to accept, a sufficient number of workers to perform such work as is essential to the servicing of hospitals and to the safety and maintenance of rolling stock, workshops and track. The workers shall also continue to work relief trains and those operated in the service of the State. In any event they shall take each train to the end of its run.

288. Where an undertaking that operates a railway contracts to provide services for the State, it shall be deemed to be acting as an agent of the State in the event of war or any serious disturbance of public order.

289. Where a worker who is about to complete the period of service prescribed for retirement purposes in the appropriate collective agreement, is guilty of some action which does not involve his loss of civil rights and is not deemed to be a criminal offence, account shall be taken of the length and quality of his service and the appropriate disciplinary penalty shall be imposed without affecting his entitlement to a retirement pension.

290. Even where they receive the compensation to which they are legally entitled, workers whose employment is terminated owing to a reduction of staff or the abolition of certain posts shall retain any rights acquired before their termination, with a view to their reinstatement if their posts are re-established, and also

with a view to their employment in the branch from which they were discharged, on condition that they continue to belong to the trade unions that concluded the relevant collective agreements and that they were members of those unions at the time of the reduction. If not, their rights to reinstatement shall be unaffected.

291. Members of a train crew shall not take on goods or passengers at any place other than those appointed for the purpose by the undertaking. Any breach of this section shall render the offender liable to the termination of his contract of employment.

292. This Chapter applies to all forms of work on the railways, that is to say the overland transport by rail of both passengers and goods, whether under a contract of carriage or as an incidental to the main work of an undertaking that is not a transport undertaking.

293. The Executive, acting on the recommendation of the Ministry of Labour and Social Welfare, shall make such regulations under this Chapter as it deems appropriate.

294. All matters not covered by this Chapter shall be governed by the other relevant provisions of this Code.

Chapter IX. Work in Air Transport

295. Employment relationships in air transport shall be governed by Part IV (General Provisions), Division I (Relationships of Undertakings with Their Workers), of the existing Civil Aviation Law and, in the absence of relevant provisions in that Law, by the provisions of this Code.

296. For the better application of the principles and provisions of this Code to air transport undertakings and for their better co-ordination with those of the Civil Aviation Law, the Executive shall, by orders issued through the Ministry of Labour and Social Welfare, make regulations for the work covered by this Chapter.

Chapter X. Workers in Petroleum Undertakings

297. On petroleum prospecting and producing sites every employer shall build accommodation for his workers; such accommodation shall be of a temporary or permanent character, according to the nature of the work, and shall conform to any health regulations issued by the General Inspectorate of Labour, having regard to the special requirements imposed by the climate and

terrain in the area and the need to prevent endemic and epidemic diseases.

The employer's obligations in this regard shall also include drainage of the land wherever necessary.

298. Petroleum undertakings shall supply their workers on prospecting and producing sites with wholesome and sufficient food or pay them such wages as are necessary to buy such food in view of the prices prevailing in the area. Any food supplied shall be reckoned as part of the wages and its estimated value shall be stated in the contract of employment and in any documents or references made out by the employer.

299. Every such undertaking shall engage the services of a Honduran physician and surgeon who is legally entitled to practise, if over a period of more than one month the number of workers employed by the undertaking does not exceed 200, and another such practitioner for every fraction of 200 in excess of 50.

300. Every undertaking shall, in each permanent centre of employment, build one or more hospitals, according to the recorded number of workers and dependants, with modern operating, laboratory, X-ray and dispensing facilities, a sufficient supply of drugs to meet the needs of any sick persons who apply for treatment and a separate department for patients suffering from infectious or contagious diseases.

301. Every undertaking shall provide hospital care for all workers that require it.

302. Every undertaking, acting through its physicians and other health personnel, shall take such preventive action as may be ordered by the Ministry of Labour and Social Welfare and the Ministry of Public Health and Social Assistance to counter malaria, tropical anaemia, dysentery, yaws and other endemic tropical affections, as well as the so-called social diseases, and to guard by modern scientific means against smallpox, yellow fever, diphtheria, typhoid fever and such other diseases as can be avoided by vaccination.

303. Petroleum undertakings shall be entitled to contract with the Ministry of Public Health and Social Assistance for the establishment of joint health centres in areas where work is in progress, and it shall be the responsibility of such centres to provide the health and welfare facilities referred to in this Chapter.

304. All matters not covered by this Chapter shall be governed by the other relevant provisions of this Code and by the Petroleum Law.

Chapter XI. Work in Mines

305. It shall be a special obligation of mining undertakings to provide free medical, pharmaceutical, surgical and hospital care for their workers in the event of a non-occupational illness lasting up to six months. Such undertakings shall engage the services of a Honduran physician and surgeon who is legally entitled to practise for every 200 workers or fraction of 200 in excess of 50.

306. No undertaking to which this Chapter applies shall, on the expiry of the period of medical care provided for in the preceding section, discharge a worker who is still unfit for work without first complying with its obligations under sections 104 and 105, in addition to meeting the cost of transport to the nearest town or village where there is a physician and a public hospital.

307. Every mining undertaking shall provide such means of preventing and curing malaria and such special treatment for endemic tropical affections as the physician may advise.

308. Every mining undertaking shall comply with the rules issued by the Ministry of Labour and Social Welfare and the Ministry of Public Health and Social Assistance in connection with occupational hygiene and safety and the maintenance of health in labour camps.

309. All matters not covered by this Chapter shall be governed by the other relevant provisions of this Code and by the Mining Code.

Chapter XII. Commercial Employees

310. The expression "commercial employee" means any person employed by a commercial or trading establishment to assist it in performing certain commercial operations.

Every owner of a commercial establishment, on admitting a person to his employment, shall record such person's name and the nature of his duties in a register to be kept for the purpose, and shall give every employee whose name is so recorded a written attestation as evidence of the entry made.

The following particulars shall be recorded in the register: the employee's full name and his place and date of birth, nationality, marital status, occupation or trade and place of domicile; the number and place of issue of his identity card; the nature of the work and the date of its commencement; the period for which the contract was concluded; the normal hours of work; and the amount of the wage and the place, date and intervals of payment.

The attestation referred to above shall be without prejudice to the employer's obligation under section 312 of this Code.

311. No commercial employee shall be compelled by his superiors or employers to work for more than eight hours a day. The distribution of the hours of work shall be settled by agreement between each employer and his employees.

The assistants in pharmaceutical chemists' shops whose premises are open for business after normal closing hours and the employees of lighting undertakings and other essential services who have to work for more than eight hours in order to deal with an additional workload shall receive the appropriate extra pay in accordance with the provisions of Part IV of this Code. The same shall apply to other commercial employees who work longer than eight hours on normal working days by agreement with their employers. No commercial employee shall be compelled by his superiors to work on public holidays.

312. Every manager or owner of a commercial establishment or undertaking shall, in the month of January of each year, furnish the General Directorate of Labour with a list of the persons in his employment and shall report any changes that occur, showing Hondurans separately from aliens and giving particulars of the duties performed and salaries earned by each, together with all the particulars specified in section 310 and any other particulars requested by the General Directorate.

313. The fact that a person working in a commercial establishment also works for some other person outside the statutory hours of work shall not prevent him from being regarded as primarily employed by the former.

314. All stores, shops, factories, workshops and other commercial or industrial establishments shall have a sufficient number of seats for their employees to be able to sit down whenever their duties permit.

315. In commercial establishments the seats shall be behind the counters or display cases, whether permanent or temporary, and no account shall be taken of the seats available for the use of the public.

316. In industrial establishments the employees shall be seated while at work if the nature of their jobs permits and the employer shall provide them with seats to enable them to work with the minimum of fatigue.

317. The labour inspectors shall ensure compliance with the preceding sections and shall impose fines of between 5 and 10 lempiras for a first offence and 50 lempiras for every subsequent offence.

Part IV. Hours of Work, Rest Days and Wages

Chapter I. Hours of Work

318. The provisions of the following sections of this Part shall be generally applicable, but do not exclude the special arrangements prescribed for certain kinds of work in other Chapters of this Code or any arrangements made by agreement between the parties, subject to the statutory limits.

319. Normal hours of work shall be those agreed between the parties or, if there is no such agreement, the statutory maximum.

320. The expression "overtime work" means any work in excess of the normal hours of work, and in any event in excess of the statutory maximum.

321. Day work is that done between 5 a.m. and 7 p.m. and night work that done between 7 p.m. and 5 a.m.

Where the hours worked cover part of the period of day work and part of the period of night work, the work shall be regarded as being done partly by day and partly by night, if the period of night work is less than three hours in length; otherwise the work shall be regarded as night work. The maximum hours for work done partly by day and partly by night shall be seven a day and 42 a week.

322. The normal hours of day work shall not exceed eight a day and 44 a week, for which a wage corresponding to 48 hours' work shall be paid. The normal hours of night work shall not exceed six a day and 36 a week.

The foregoing provisions shall not apply in the clearly defined and exceptional cases specified in this Code.

A worker who is absent on any day of the week and fails to work the full 44 hours shall only be entitled to a wage proportionate to the time worked, on the basis of the wage payable for a 48-hour week.

The foregoing principle shall also apply to normal hours actually worked by night or partly by day and partly by night.

323. The expression "actual working time" means any time during which the worker remains at the employer's disposal or cannot leave his place of work during his breaks for rest or meals.

324. The Government may order the hours to be reduced in particularly unhealthy or dangerous types of work, after an investigation has been carried out by the Ministry of Labour and Social Welfare.

325. The provisions as to the maximum statutory hours of work shall not apply to—

(a) persons in managerial or supervisory posts or positions of trust;

(b) domestic servants, whether in urban or rural areas;

(c) persons employed on intermittent work, such as hairdressers, hotel staff and any other persons whose work is so described by the General Directorate of Labour and persons whose work consists merely in supervising others, such as stewards or overseers, if they are resident at their place of work;

(d) private chauffeurs and drivers employed by transport undertakings of all kinds, whatever the form of their remuneration;

(e) persons engaged in work that by its nature is not subject to fixed hours, e.g. ag culture, stockbreeding and the like; and

(f) workers paid on commission and similar workers who do not perform their duties on the premises of the establishment or place of employment.

Such persons shall not, however, be required to remain at work more than 12 hours a day and while at work shall be entitled to a minimum rest period of one-and-a-half hours, which may be divided into periods of not less than 30 minutes each.

The Executive shall, by orders issued through the Ministry of Labour and Social Welfare, make such regulations as are necessary to determine the scope of this section.

326. The normal hours of work on any day may be continuous or may be divided into two or more periods with such breaks for rest as are appropriate to the nature of the work and the requirements of the workers.

Where it is agreed that the normal hours of work are to be continuous, the worker shall be entitled to a minimum of 30 minutes' rest in the course of the day; this rest shall be counted as actual working time.

327. At the end of each working day the workers shall be granted a rest period of not less than ten consecutive hours.

328. Permanent workers who by law or by agreement with their employers work less than 44 hours a week shall be entitled to receive the full wage for a normal week of day work.

329. Night work, solely by reason of its being done at night, shall be remunerated at 25 per cent. more than day work.

The same increase shall be paid for any hours of night work when work is done partly by day and partly by night.

330. Any actual work that is done outside the limits specified for normal hours of work in the preceding sections or that

exceeds any shorter hours of work agreed between the parties shall be deemed to be overtime and shall be remunerated at the following rates:

(1) at 25 per cent. more than the day-time wage when the work is done by day;

(2) at 50 per cent. more than the day-time wage when the work is done by night; and

(3) at 75 per cent. more than the night-time wage when the overtime is done in addition to night work.

331. No overtime rate shall be payable when a worker is employed on overtime for the purpose of correcting mistakes which he made during his normal hours of work and for which he alone is responsible.

332. The normal hours of work, plus overtime, on any day shall not exceed 12 hours unless persons, establishments, machinery, equipment, plants, products or crops are threatened by the occurrence of a disaster or by some imminent danger and substitutes cannot be found for the workers concerned or the work be suspended without manifest damage.

333. Overtime shall not be permitted in the case of work that is by nature dangerous or unhealthy; nor shall an employer allow a given worker to work overtime more than four times a week, unless there is a manifest shortage of labour at sowing or harvest time.

334. Every employer shall arrange as many shifts, each consisting of different workers, as are necessary to do the work within the limits of the working hours prescribed in this Chapter.

335. In his wage books or payrolls every employer shall record the amounts paid to each worker in respect of overtime separately from the entries in respect of normal hours.

336. Detailed rules for the application of the preceding sections to transport and communication undertakings and to undertakings in which the work is of a special or continuous nature shall be contained in regulations to be issued by the Executive, which shall take due account of the requirements of the service and the interests of employers and workers.

337. The employer shall not in any circumstances allow his workers to be employed in such a manner that they have to forgo the normal time that they would otherwise devote to restoring their energies.

The employer shall also avoid any change in shifts that alters the hours intended for rest and meals.

Chapter II. General and Special Rest Days

338. Every worker shall be granted one day's rest, which shall preferably be Sunday, for every six days' work. Notwithstanding the foregoing, a rest period of 24 consecutive hours may be fixed for any other day, in substitution for the rest on Sunday, in the following cases:

(1) where there is an evident and urgent need to do work which cannot be interrupted;

(2) where the technical or practical nature of the work is such that it has to be continued;

(3) where an interruption of such work on Sundays could be seriously prejudicial to the public interest or to public health;

(4) in agriculture and stockbreeding; and

(5) in the work of domestic servants and private chauffeurs.

The foregoing shall also apply where it is desired to make a working day of a public or national holiday.

Every worker shall invariably be guaranteed his weekly rest.

No exception to the rule of a compulsory rest on Sundays shall apply to persons under 16 years of age.

339. Every employer shall be obliged to pay his workers for the following public or national holidays, even where they fall on a Sunday: 1 January, 14 April, 1 May, 15 September, 3, 12 and 21 October and 25 December; the same obligation shall apply in respect of Maundy Thursday, Good Friday and Easter Saturday.

If an employer suspends work on account of any public holiday not mentioned in the preceding paragraph he shall be required to pay the wages due for the said holiday as if work had been continued.

The wages due in respect of public or national holidays not worked shall be paid on the basis of the daily average of the ordinary and overtime pay earned by the worker during the week immediately preceding the public or national holiday in question.

If the worker did not work during the immediately preceding week, the rate shall be based on the wage paid for a normal day's work.

Where wages are fixed on a fortnightly or monthly basis, they shall implicitly include the payment due in respect of any public or national holidays not worked.

340. Where work is continued on a weekly rest day or public or national holiday by virtue of an agreement, the wage paid in respect thereof shall be calculated in proportion to the time worked at double the rate payable for a normal working day, without prejudice to the worker's entitlement to any other day of rest in the course of the week in accordance with section 338.

341. The Government may prohibit or limit Sunday work in particular occupations in the larger towns, irrespective of the number of workers employed in each establishment.

No worker shall be employed after 1 p.m. on the day preceding the weekly rest day.

342. In the case of work that cannot be suspended, such as work on voyages on inland waterways or by sea, any rest days which the workers concerned are prevented from taking over a week or more shall be carried over until the week following the conclusion of the work; if the contract of employment terminates on the conclusion of the work, an appropriate sum of money shall be paid in lieu.

343. Where work is normally or invariably done on Sundays, the employer shall post up a list at least 12 hours beforehand in a public place within the establishment, showing the workers who cannot have their Sunday rest owing to the requirements of the service. The list shall also indicate the date and time when the compensatory rest is to be taken.

344. All commercial and industrial establishments shall be closed on Sundays and national holidays, subject to the following exceptions:

(1) those covered by section 338; hotels, restaurants, public markets, undertakings for the sale of refreshments, chemists' shops, undertakers, bakers and petrol stations;

(2) places of amusement and entertainment; and

(3) establishments for the retail sale of foodstuffs (vegetables, fruit and milk).

Such establishments may remain open on all days and at all hours authorised by the laws or special regulations in force. Such regulations shall be issued after consultation with the employers and workers concerned.

Chapter III. Annual Leave

345. Every worker shall be entitled to annual leave with pay, to the extent and at the times indicated in this Chapter. In the event of unwarranted dismissal, the employer shall, in addition to any statutory compensation due, pay such cash amount in lieu of leave as corresponds to the worker's period of service.

346. The period of paid leave to which a worker is entitled after each year of continuous employment with the same employer shall be at least

(a) ten consecutive working days after one year's continuous service;

(b) 12 consecutive working days after two years' continuous service;

(c) 15 consecutive working days after three years' continuous service;

(d) 20 consecutive working days after four or more years' continuous service.

The continuity of employment shall not be deemed to be broken by unpaid leave, rest periods granted in accordance with this Code, the regulations made thereunder and the related laws, certified illness, the extension or renewal of the contract of employment, or any other similar factor that does not terminate the contract.

347. In types of employment where the work is not regularly maintained throughout the year, the requirement of continuous service shall be deemed to have been fulfilled if the person concerned has worked for not less than 200 days in the course of the year in question.

348. The time for taking the annual leave shall be indicated by the employer within three months of the date of entitlement thereto, and the leave itself shall be granted automatically or on application by the worker, due account being taken of the requirements of the service and the effectiveness of the rest. The employer shall give the worker ten days' notice of the date on which his leave is to be granted.

Any sums to which the worker is entitled in respect of leave shall be paid to him three days before the leave begins.

It shall not be lawful to pay cash in lieu of leave, but the Ministry of Labour and Social Welfare may authorise such payment in special cases where prejudice would otherwise be caused to the national economy or to industry.

349. Any worker who has become entitled to leave and who ceases to be employed for any reason before taking it shall receive an appropriate cash payment in lieu.

Where a contract of employment is terminated for reasons attributable to the employer before the completion of the period giving rise to an entitlement to leave, the worker shall have the right to receive such proportion of the cash amount that would have been payable to him in respect of leave as corresponds to his period of service.

350. It shall not be lawful to accumulate leave: Provided that such accumulation shall be permissible once only if the worker holds a technical or managerial post, a position of trust or some other similar job that makes it especially difficult to find a substitute for him. In such cases leave may be accumulated for not more than two years.

351. Every worker shall enjoy an unbroken period of leave; in cases of urgent necessity, however, the employer may require a worker to interrupt his leave and return to work. In such cases the worker shall not forfeit his right to the remainder of his leave.

The employer shall defray any out-of-pocket expenses incurred by the worker on account of the interruption and resumption of his leave.

352. For the purpose of assessing the wages payable to a worker in respect of leave, the basis taken shall be the average ordinary remuneration earned by him over the last six months or over any shorter period where the contract has not been in force for six months; together with the value of any remuneration payable in kind.

To calculate the average mentioned in the preceding paragraph the total sum of the amounts received by the worker as ordinary wages shall be divided by the number of days worked by him over the period taken as a basis for the calculation.

353. Any unwarranted absence from work shall not be deducted from the period of leave, save where the worker has been paid therefor.

If the wages of the worker have been fixed on a fortnightly or monthly basis, the employer shall not deduct any unwarranted absence for which the worker has been paid in excess of a number of days equal to one-third of the period of leave.

354. No worker shall be permitted to do work of any kind for any other person while on leave.

355. The employer shall keep a written record, signed by the worker, of any leave granted and of any leave accumulated in accordance with section 350.

In the absence of proof to the contrary it shall be assumed that leave has not been granted if the employer, when requested to do so by the labour authorities, fails to produce the relevant records signed either by the worker or, if he so requests and he cannot sign his name, by two of his fellow workers, or bearing the worker's fingerprint.

356. A worker shall be entitled to leave even if he is not required by his contract to work the full normal number of hours or on every day of the week.

357. Any worker appointed to act as a representative of his country at international labour congresses or conferences that have been approved by the ministry concerned shall be entitled to the continued payment of his wage or salary for such time as he so acts.

The wage or salary earned in accordance with this section shall not affect the leave to which the worker is entitled.

The foregoing shall also apply in cases where the worker acts as a representative within Honduras.

Where the worker acts as a representative within Honduras, the time so spent shall not exceed ten days; where he acts as a representative abroad, the time so spent shall not exceed 20 days.

The ministry concerned shall specify the time for which the worker is to act as a representative in each case.

358. In determining the amount due as leave pay, no account shall be taken of any sums received in the form of bonuses or ex gratia payments.

359. The Ministry of Labour and Social Welfare shall ensure strict compliance with the provisions of this Chapter and shall, through the General Inspectorate of Labour or its representatives, impose fines of between 5 and 100 lempiras for any offences thereunder, without prejudice to the exercise of any right to which the offences relate.

Chapter IV. Wages

360. A wage or salary is the remuneration that an employer is required to pay a worker under a contract of employment or by virtue of an employment relationship.

361. Wages include not only the fixed or ordinary remuneration but also all payments received by the worker in cash or kind in consideration of his services, irrespective of the form or denomination thereof, such as regular bonuses, allowances and grants, overtime pay, pay for work on compulsory rest days, percentages of sales, commissions and shares in profits.

362. Wages shall not be deemed to include any sums that the worker receives from time to time from the employer as a mere gratuity, such as occasional bonuses, allowances and grants, or what he receives in cash or kind not for his own benefit, to meet his own needs or to enrich his own estate but for the better discharge of his duties, such as representation allowances, transport, equipment and the like, or social security benefits.

363. Wages shall be fixed at the discretion of the parties, but shall not be less than the minimum fixed in accordance with this Code.

364. For the purposes of payment, it may be agreed that the remuneration is to be calculated on the basis of—

(a) a unit of time (month, fortnight, week, day or hour);

(b) a unit of work (piece, job or agreed rate); or

(c) a share in the profits, sales or receipts of the employer.

365. Wages shall be paid in legal tender. It shall not be lawful to make payment in the form of promissory notes, vouchers, tickets, coupons or any token intended as a substitute for cash.

366. Any additional benefits received by a rural worker or his family in the form of food, housing and other articles intended for their immediate personal consumption shall be regarded as part of the ordinary remuneration for the work done, on condition that the value assigned to such benefits does not exceed 30 per cent. of the cash wage and that such articles are provided by the employer at or below cost.

In agricultural and stockbreeding undertakings the right to use land which the employer makes available to the worker for sowing and the enjoyment of the produce shall be regarded as remuneration. In such a case the remuneration shall be deemed to be equal to the agreed rent for the land.

Supplies furnished by the employer to the worker free of charge shall not be regarded as wages, and their value shall not be deducted from the cash wage or taken into account in fixing the minimum wage.

367. In fixing the wage payable in each type of work, account shall be taken of the degree of concentration and quality involved, the climate, the living conditions and the length of service of the worker. Equal wages shall be paid for equal work without any discrimination whatsoever, on condition that the jobs, the hours and the workers' efficiency and length of service within the same undertaking are also equal. It is understood that such wages include not only all payments made on a day-to-day basis but also all grants, allowances, accommodation and other items received by a worker in consideration of his ordinary work.

It shall not be lawful to establish different wage rates on grounds of age, sex, nationality, race, religion, political opinion or trade union activities.

368. The parties shall fix the interval for the payment of wages, but it shall not in any circumstances exceed one week in the case of manual workers or one month in the case of intellectual workers and domestic servants.

If the wages consist of a share in the profits, sales or receipts of the employer, a sum payable to the worker once a week or once a month shall be fixed in proportion to his requirements and to the probable amount of his earnings. A final settlement shall be made not less than once a year.

Subject to the provisions of the preceding paragraph wages shall be paid in full in each pay period. For the purpose of

assessing any compensation or benefits granted in pursuance of this Code, the full wage shall be deemed to mean the amount earned during the normal hours of work and overtime, or during the equivalent hours in the case of work done at piece rates.

For the purpose of the preceding paragraph the provisions of section 366 shall apply to wages that include additional benefits.

369. Except as may be otherwise agreed in writing, payment shall be made at the place of employment of the worker, during or immediately after working hours.

No payment shall be made (or if so made shall not be recognised) in any place of amusement or intemperance, shop or place for the sale of alcoholic liquor, save where the workers concerned are employed in the establishment where payment is effected.

370. Wages shall be paid directly to the worker, to a person authorised by him in writing in the presence of two witnesses, or to a person appointed by written order of the labour authorities.

371. The minimum wage fixed by law or agreement, the wage payable during annual leave and the first 100 lempiras of the monthly amount of any wage shall not be liable to attachment.

Only one-quarter of the sum in excess of 100 lempiras in the monthly amount of any wage shall be liable to attachment.

Notwithstanding the provisions of the preceding paragraphs, any type of wage shall be liable to attachment in the following cases:

(1) up to 50 per cent. to pay maintenance allowances in the manner prescribed by law; and

(2) up to 40 per cent. to pay for the worker's dwelling or any articles of food purchased for his own consumption or that of the members of his family or his wife or the person living as his wife, where such persons live with him and are financially dependent on him.

Where two or more writs of attachment are issued in cases to which clauses (1) and (2) of this section relate, the later writ or writs shall affect only the prescribed percentage of the part of the wage not affected by the first writ.

372. In no circumstances shall interest be charged on any advances made by the employer to the worker on account of wages.

Any debts contracted by the worker with the employer on this account or on account of excess payments or civil liabilities incurred in connection with his employment shall be paid off while the contract of employment is in force over not less than five wage periods. On the termination of the contract the employer shall be entitled to make the necessary final settlement.

In other cases any debts contracted by the worker with the employer or with any of the employer's associates, dependants or employees while the contract of employment is in force or before it is made shall not be deducted from or set off against wages except in so far as the wages earned by the worker are liable to attachment.

373. Wages not exceeding 200 lempiras a month shall not be ceded, transferred, set off or hypothecated in favour of persons other than the worker's wife or the person living as his wife and the members of his family who are living with him and are financially dependent on him, except in so far as the wages in question are liable to attachment. The foregoing shall be without prejudice to lawful transactions with co-operative societies or credit institutions operating under a permit granted in accordance with the law.

374. Credits accruing to workers on account of wages earned over the past year, cash compensation to which they are entitled on the termination of their contracts of employment, and social security benefits shall enjoy priority. In the event of insolvency, failure, bankruptcy, attachment, inheritance or other similar circumstances, the administrator, trustee, depositor or executor shall be required to pay such credits within 30 days of their formal recognition by the labour judge or as soon as funds become available if there are no funds available on the expiry of this period.

375. Workers employed by contractors or middlemen shall be entitled to require the persons on whose behalf the said contractors or middlemen are operating to retain and pay out the amount of any salaries or wages earned in an agreed pay period, if such amount was not paid on the due date.

376. Every worker shall be entitled to receive his wages for such time as his contract is in force, even where no work is done as a consequence of orders issued by the employer or on account of circumstances attributable to the employer.

377. Where no wage rate has been expressly fixed the wage due shall be that normally paid for the work in question, or, where there is no such normal wage, a wage fixed in the light of the quantity and quality of the work done, the worker's ability and the terms customary in the area.

378. In the absence of any agreement to the contrary in cases where the work is done for a certain number of days or on the basis of a prescribed unit, piece or measurement or in some other way allowing of its partial performance, the wage may be paid in instalments and the worker shall be entitled to require it to be so paid, in proportion to the work done.

379. To be valid, any document involving a set-off, compromise, settlement or arrangement between the worker and the employer shall be drawn up in the presence of the competent labour authorities.

380. Every person regularly employing ten or more workers shall keep a wage book duly approved and stamped by the General Directorate of Labour, which shall prepare models and instructions for the proper printing of such books.

Every person regularly employing three or more workers but less than ten shall draw up a nominal roll conforming to the models adopted by the Honduran Social Security Institute.

Chapter V. Minimum Wage

381. The expression " minimum wage " means the wage that every worker is entitled to receive to meet his normal material, spiritual and cultural needs and those of the members of his family.

382. In fixing the minimum wage, account shall be taken of the characteristics of each kind of work, the special conditions obtaining in each region and each occupation, the cost of living, the relative aptitude of the workers and the systems of remuneration adopted by undertakings.

In fixing the minimum wage of rural workers, account shall be taken of the benefits provided by the employer in the form of housing, crops, fuel and other similar advantages that reduce the cost of living.

The fact that some employers may have to provide board and lodging for their workers shall also be taken into account in fixing the minimum wage.

383. The minimum wage shall be fixed from time to time by the Ministry of Labour and Social Welfare in accordance with clause (5) of section 112 of the Constitution of the Republic [2], on the basis of the recommendations made to it by the National Minimum Wage Board, which shall consist of—

(a) the General Inspector of Labour (chairman);

(b) the Director-General of Census and Statistics.

Each of the above officials shall have a deputy, who shall be his immediate subordinate or the person acting as such;

(c) one representative and one deputy representative of the National Economic Council;

(d) one representative and one deputy representative nominated by the workers' organisations of the Republic; and

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[2] *Legislative Series*, 1957 (Hon. 5).

(c) one representative and one deputy representative nominated by the associations of farmers, stockbreeders and industrialists and by the chambers of commerce.

In the case of clauses *(d)* and *(e)* the Ministry of Labour and Social Welfare shall select the representatives from among the nominations put forward by the organisations concerned.

384. The National Minimum Wage Board may appoint provincial minimum wage boards consisting of the provincial governor (chairman) and one employer and one worker. The employer and worker shall each be appointed from a list of three candidates submitted by the employers' and workers' organisations, where such exist.

385. The National Minimum Wage Board shall also have power to appoint special boards for one or more industries in one or more production centres or areas, to study the conditions obtaining therein and to propose appropriate minimum wage rates therefor.

Such boards shall consist of a representative of the industrialists concerned, a representative of the workers' union concerned and a representative of the National Board.

386. The National Minimum Wage Board shall have the following terms of reference:

(1) to make recommendations to the Ministry of Labour and Social Welfare before 30 April each year for the fixing of wages in the various provinces, regions or areas of the country, for each branch of clerical, industrial, agricultural, stockbreeding and commercial work;

(2) to ensure compliance with any wage-fixing decrees made and to report contraventions to the labour authorities; and

(3) to give an expert opinion on any application for a revision of the wage rates while a minimum wage-fixing decree is still in force, on condition that the application is signed by at least ten employers or workers in the branch of clerical, industrial, agricultural, stockbreeding or commercial work for which the revision is requested. Where there are fewer than ten employers, the application shall be signed by all the employers in the branch concerned.

387. In the light of the aforesaid reports and opinions the Ministry of Labour and Social Welfare shall make an executive decree fixing the minimum wage rates that are to apply during the year beginning on the first day of July next following its promulgation in each branch of clerical, industrial, commercial, stockbreeding and agricultural work and in each economic area or territory.

In fixing such rates, due account shall be taken of whether the wages are paid in the form of time, piece, job or agreed rates, so that the interests of workers whose earnings are based on lump sums or units of work are not adversely affected; such rates shall also be fixed according to the class of worker and the kind of work.

388. The opinion of the National Minimum Wage Board on any application for revision made while a decree is still in force shall be brought to the notice of the Ministry of Labour and Social Welfare within 30 days of the submission of the application to which the opinion relates. The Ministry shall give a decision within six days of receiving of the opinion.

Any change or derogation shall take effect ten days after the promulgation of the appropriate decree.

389. The fixing of a minimum wage rate shall automatically amend any contracts of employment providing for a lower rate and shall raise such lower rate to the minimum without altering the other provisions of the contracts.

390. For the better discharge of their duties the boards shall always take account of the current cost-of-living index calculated by the Central Bank of Honduras and may require the General Directorate of Labour or any other public body or institution to supply them with such assistance or reports as they may need.

Private undertakings shall supply any information requested of them, subject to the limitations laid down by the ordinary law.

Part V. Protection of Workers in the Course of Their Employment

Chapter I. Occupational Health and Safety

391. All employers and undertakings shall be required to provide and equip such premises and plant as will guarantee the workers' health and safety.

For this purpose they shall, within such time as may be determined by the General Inspectorate of Labour and in accordance with such regulations as may be issued by the Executive, take at their own expense all necessary health and safety measures at their places of employment to prevent, reduce or eliminate the risk of employment injuries.

392. Every employer shall also comply, and ensure compliance, with the measures prescribed by the Ministry of Labour and Social Welfare for the prevention of employment injuries.

393. Home work and work on which only members of the same family are engaged shall be subject to the foregoing provisions, the obligations laid down therein being discharged by the workers concerned or by the head of the family, as the case may be.

394. Measures shall be taken in industrial and commercial establishments to protect the morals and ensure the well-being of the workers. Such measures shall more particularly include the following:

(1) a prohibition on the introduction, sale and use of narcotic drugs or intoxicating liquor;

(2) the provision of special premises for eating and sleeping, which shall not be permitted at workplaces; and

(3) the limitation to 50 kilograms of the weight of any sack or package carried by a worker, with a margin of up to 10 per cent. in such special cases as are specified in regulations. Heavier loads shall be moved by mechanical means.

395. Any process, plant or industry shall be deemed to be unhealthy if it is capable of giving rise to conditions that could threaten or impair the workers' health owing to the substances used, manufactured or given off or owing to the waste matter produced in the form of solids, liquids or gases.

Any process, plant or industry shall be deemed to be dangerous if it is such that it is or may be immediately and seriously prejudicial to the workers' lives, whether by its nature or owing to the substances used, manufactured or given off, to the waste matter produced in the form of solids, liquids or gases or to the storage of toxic, corrosive, flammable or explosive substances in any form.

Regulations shall prescribe the undertakings to be regarded as unhealthy or dangerous, the substances whose manufacture is to be prohibited, restricted or made subject to certain requirements, and in general the rules to be observed in this regard.

396. All workers engaged in handling, processing or retailing foodstuffs for public consumption shall obtain a medical certificate each month, attesting that they are not suffering from any infectious or contagious disease or any disease rendering them unfit to be employed on such work. The provisions of section 157 shall apply to such medical certificates.

397. Persons regularly employing ten or more workers shall draw up special health and safety rules, which they shall submit for the examination and approval of the General Inspectorate of Labour within three months of the date of commencement of this Code or, in the case of a new establishment, within three months of its beginning operations.

398. The special rules required by the preceding section shall at least contain provisions relating to the following:

(1) the workers' protection and personal hygiene;

(2) the prevention of accidents and diseases;

(3) the provision of a medical or health service in the undertaking and of day nurseries, where appropriate;

(4) a prohibition on accommodating persons in buildings where dangerous or unhealthy processes are carried on;

(5) the provision of seats for workers in shops, factories, workshops and similar establishments;

(6) in the case of work involving electric welding, the standards to be met by the premises and the protection to be provided for the workers;

(7) special standards, in the case of mining and petroleum undertakings;

(8) the safety measures to be observed in electric power undertakings and in places where explosives, flammable substances and other dangerous materials are stored; and

(9) the health measures to be observed in agricultural, stock-breeding and forestry undertakings.

399. Once the rules have been approved in accordance with section 397, the employer shall ensure that they are displayed at two prominent places on the premises where the work is carried on.

400. The Ministry of Labour and Social Welfare shall ensure compliance with the provisions of this Chapter, consider complaints by employers and workers with regard to contraventions, warn those who are remiss in complying with their obligations and, in the event of negligence or a repetition of the contravention, impose penalties corresponding to the means of the offender and the nature of the offence.

Chapter II. Employment Injuries

Division I. General Provisions

401. Every employer shall be required to pay the benefits provided for in this Part, subject to the exceptions laid down therein.

An employer shall cease to be liable for the payment of such benefits when liability for the coverage of the contingencies concerned is assumed by the Honduran Social Security Institute in accordance with the law and subject to the regulations issued by the Institute.

402. The expression "employment injuries" means the accidents or diseases to which workers are exposed by reason of the work they perform for another person.

403. The expression "employment accident" means any sudden and unexpected occurrence arising in connection with or as a consequence of employment and resulting for the worker in a permanent or temporary physical injury or functional disorder.

404. The expression "occupational disease" means any pathological condition arising as a necessary consequence of the type of work done by the worker or of the surroundings in which he is compelled to work, whether caused by a physical, chemical or biological agent.

The local endemic and epidemic diseases shall be deemed to be occupational only when contracted by those employed to combat them.

For the purposes of this section a table of occupational diseases is given hereinafter.

405. The expression "employment injury" also means any injury or disease or any aggravation of a previous injury or disease from which a worker subsequently suffers as the direct, immediate and undoubted consequence of an employment accident or occupational disease sustained or contracted by him in the manner specified in the preceding sections.

When the consequences of an employment injury are aggravated by a disease or injury contracted or sustained before the event or events that caused the employment injury, the aggravation shall be regarded for the purposes of compensation as the direct result of the employment injury and as the indirect result of the original disease or injury.

406. Apprentices shall be deemed to be workers for the purposes of this Chapter.

407. Injuries may lead to —

(a) death;

(b) permanent total incapacity;

(c) permanent partial incapacity; and

(d) temporary incapacity.

408. The expression "permanent total incapacity" means that which disables the worker in an absolute and lasting manner.

409. The expression "permanent partial incapacity" means the diminution of an individual's powers through the loss or paralysis of a limb, organ or function of the body.

410. The expression "temporary incapacity" means that which prevents a worker from performing his habitual work for a limited period not exceeding a year, where on the termination of treatment he is fit for work.

411. The amount of a worker's wage shall be determined as follows:

(1) The daily wage is the fixed amount that the worker receives for an ordinary day's work, plus any special allowances provided for by contract.

If the wage varies or is paid as a lump sum or on a piece-work basis, the daily wage shall be determined by dividing the remuneration earned over the 12 months preceding the occurrence of the employment injury, or over such shorter period as the worker has spent in the employer's service, by the number of ordinary days' work that he has actually performed for the employer.

(2) The annual wage is any remuneration that the worker has received over the last year covered by his contract of employment. If he has not worked for a full year for the employer, the annual wage shall be determined by multiplying the daily wage rate by 300. Where the wage calculated by this method does not equal the normal wage earned by other workers in the same or some similar occupation or trade and category as the injured worker, the basis taken shall be the amount earned by such other workers.

(3) The annual wage shall not in any circumstances be deemed to be less than 600 lempiras, even in the case of the persons to whom section 406 relates.

(4) The annual wage of apprentices whose remuneration is lower than that of other ordinary workers shall be determined by multiplying by 200 the lowest daily rate paid to ordinary workers employed in the same or some similar establishment, business or trade in the same locality.

The expression "ordinary worker" means a worker who is fully skilled in his trade, without being in any way outstanding.

(5) For three months the employer shall not in any circumstances be entitled to refuse the injured worker's family any special benefits which they were actually receiving at the time the employment injury occurred.

(6) The pay-rolls and other written records of payment shall be preferred as evidence in determining the true amount of the wage paid.

412. In every undertaking or workplace where ten or more workers are employed there shall be set up such safety committees

as are deemed necessary. Such committees shall consist of employer's and workers' representatives in equal numbers and shall investigate the causes of employment injuries, suggest preventive measures and ensure that such measures are applied. Written notice of the establishment of such committees shall be given to the General Inspectorate of Labour; the members shall perform their duties in an honorary capacity during working hours.

For the proper attainment of the purposes referred to in the preceding paragraph the Ministry of Labour and Social Welfare shall, after full consultation with the Honduran Social Security Institute, promulgate regulations every year, containing a list of the mechanical and other means of preventing employment injuries. After the first list has been promulgated, it may be confirmed at the end of each year if there have been no changes or improvements that call for an amendment of the text.

Division II. Liability for Employment Injuries

413. Every employer shall be liable for compensation in respect of the employment injuries sustained by his workers, within the meaning of sections 403 and 404.

Any physical injury sustained by a worker while he is at work shall be presumed to be an employment accident and any disease contracted by a worker as a result of the type of work he does shall be presumed to be an occupational disease.

The worker's imprudence (that is his neglect to take certain precautions owing to his confidence in his own skill or dexterity in his trade) shall not release the employer from liability unless such imprudence constitutes a manifest disregard of the employer's instructions or the rules of employment.

Injuries due to an external cause beyond the employer's control and unconnected with the employment, injuries due to the deliberate act of the worker and injuries due to intentional drunkenness shall not be deemed to be employment injuries unless in the last case the employer or his representative allowed the worker to perform his duties.

414. Where an employment injury is the result of an offence or technical offence attributable to the employer or to the inexcusable negligence of the employer and compensation in respect of the injury is awarded by the ordinary courts, it shall be understood that any payments made by the employer on the instructions of the labour courts are to be deducted from such compensation.

Where proceedings to which the preceding paragraph relates are instituted only in the labour courts, such courts shall officially inform the ordinary courts.

Where an injured worker is insured, the Honduran Social Security Institute shall immediately pay the appropriate compensation to the worker or his heirs in the cases covered by this section: Provided that if the employer is sentenced by the ordinary courts he shall reimburse the Institute for any sum or sums it may have paid, together with interest at the legal rate. For this purpose the judgment of the court may be used by the Institute as a basis for enforcement.

415. Where an employment injury is the result of the inexcusable negligence of a third party or of an offence or technical offence attributable to a third party, the worker or his heirs shall be entitled to institute proceedings for damages against him under the ordinary law with the appropriate courts, while at the same time exercising their rights and instituting proceedings against the employer in virtue of this Chapter, and without prejudice to such rights and proceedings.

The damages to be paid by any such third party shall also include all the compensation payable under this Chapter, if the worker or his heirs have not applied for and obtained such compensation from the employer, who in such a case shall be released from liability.

If the worker or his heirs claim compensation from any such third party after the employer has paid the deposit mentioned below or the compensation due under this Chapter, the ordinary courts shall award the appropriate damages, minus any sum or sums received by or actually payable to the injured worker or his heirs. In such a case an employer who is not insured and who makes to the order of the worker or his heirs a sufficient deposit with the Honduran Social Security Institute to cover the compensation provided for in this Chapter, or who pays such compensation directly through the labour courts, may institute proceedings in the ordinary courts against those responsible for the occurrence of the employment injury in order to recover an amount not exceeding the amount that he has paid. If the employer is insured, only the Institute shall be entitled to be a party to such proceedings.

For the purposes of this section the expression "third party" means any person other than the employer, his representatives in the conduct of the work, and the workers he employs.

416. The employer shall continue to be liable even where the worker is employed under the direction of a contractor whom the employer has engaged to run his business: Provided that in the case of forestry, agriculture, stockbreeding and fishery undertakings, a contractor who uses power-driven machinery shall be solely and directly liable for injuries caused by any machinery belonging to him.

Division III. Payment of Compensation and Commutation of Benefits

417. The basis for calculating the compensation referred to in this Part shall be the daily wage received by the worker at the time the injury is sustained. In the case of workers whose wages are calculated at piece rates, the basis shall be the daily average over the month last preceding the accident or, failing this, the daily average over the week last preceding the accident.

The basis for fixing the compensation payable to apprentices shall be the lowest wage earned by a worker in the same occupational category.

In no circumstances shall the basis of compensation be less than the minimum wage.

418. Every worker who sustains an employment injury shall be entitled to—

(1) medical and surgical treatment;

(2) medicaments, dressings and appliances;

(3) the compensation prescribed in this Part; and

(4) the cost of transport and admission to hospital and the cost of board and lodging if he has to live and be treated at a place other than his usual place of residence or employment. If there is disagreement between an employer and a worker over the amount corresponding to the cost of board and lodging, the labour court shall fix the said amount at the request of either of the parties without further formality. No appeal shall lie against the court's decision.

419. In the event of an employment injury the employer shall immediately provide any necessary medicaments, dressings, appliances and treatment. For this purpose—

(1) every employer shall keep in his factory or workshop such necessary medicaments for first aid as are prescribed by the General Inspectorate of Labour;

(2) every person regularly employing between 100 and 400 workers shall establish a dispensary with the necessary medicaments, dressings and appliances for urgent medical and surgical treatment. This dispensary shall have a competent staff working under the direction of a Honduran physician and surgeon who is legally entitled to practise, and if the said physician considers that proper medical treatment cannot be given at the place of employment itself the injured worker shall be transferred to the nearest town, hospital or place where treatment can be given; the foregoing shall be on the employer's responsibility and at his expense;

(3) every person regularly employing over 400 workers shall maintain a hospital, which shall be under the direction and responsibility of a Honduran physician and surgeon who is legally entitled to practise; and

(4) in the case of undertakings that are located in places where there are hospitals or sanatoria or in places from which such hospitals or sanatoria can be reached in two hours or less by the ordinary means of transport available at all times, the employer may fulfil his obligation under this section by contracting with such hospitals or sanatoria for treatment to be given to his workers in the event of employment accidents or occupational diseases.

420. Where the injury sustained results in the worker's death, compensation shall consist of—

(1) a full month's wages for funeral expenses; and

(2) the payment of an amount equivalent to 620 days' wages to the persons financially dependent on the deceased, without deduction of any compensation received by the worker while he was incapacitated for work or any cost of treatment or medical attendance.

421. The following persons shall be entitled to receive compensation in cases of death:

(1) the wife or person living as the wife and any children who have not yet come of age, and any relatives in the ascending line who were financially dependent on the worker. The compensation shall be divided equally among these persons if there is no will or, if there is one, in accordance with its provisions; and

(2) in the absence of any children, wife, person living as the wife or relatives in the ascending line covered by the preceding clause, the compensation shall be divided among the persons who were partially or wholly dependent on the worker, in proportion to the extent of their dependence, as evidenced by any legally recognised means of proof.

422. The payment of compensation in the event of death shall be subject to the approval of the appropriate labour court, which shall decide whether the claimants are the deceased worker's children, wife or person living as his wife, without confining itself to the rules of ordinary law governing proof of the family relationship: Provided that the court shall not reject the evidence of deeds of civil status, if any are submitted. The judge's decision in ordering the payment of compensation shall not have legal force otherwise than in relation to such payment.

423. Where an employment injury results in permanent or temporary total or partial incapacity, only the injured person

himself shall be entitled to compensation under this Code: Provided that he shall be entitled to nominate any other person to represent him in proceedings to secure the payment of such compensation. If as a result of an employment injury a worker becomes wholly or partially incapacitated through mental derangement, the compensation shall be paid to the person representing him in accordance with the law.

424. If as a result of an employment injury a worker disappears without there being any certainty of his death, and if no more is heard of him within 30 days of the occurrence, he shall be presumed to be dead for the purpose of the payment of the statutory compensation to his heirs, without prejudice to any action which may be taken subsequently if he is proved to be alive.

425. Where an employment injury results in permanent total incapacity, the compensation shall consist of an amount equal to 620 days' wages.

426. Where an employment injury results in permanent partial incapacity, the compensation shall consist in the payment of such percentage of the amount due in the event of permanent total incapacity as is specified in the incapacity assessment table. The percentage chosen shall be such rate between the maximum and minimum as is most appropriate, having regard to the worker's age and degree of incapacity and to whether he is completely unable to perform his own job, although still able to undertake some other job, or whether his capacity for that job has merely been reduced. Account shall also be taken of whether the employer has arranged for the worker's vocational rehabilitation and has supplied him with articulated artificial limbs.

427. An injury resulting in severe mutilation or disfigurement without leading to incapacity shall for the purposes of compensation be deemed to be equivalent to permanent partial incapacity.

428. Where an employment injury results in temporary incapacity, the compensation shall consist in the payment of 75 per cent. of the wages lost while the worker is unable to work. Payment shall commence on the first day of incapacity.

Where a worker is unable to return to work within three months of the commencement of his incapacity, he or the employer may request that, having regard to the appropriate medical certificates, expert opinions and any other relevant evidence, a decision should be taken as to whether the injured worker should continue to receive the same medical treatment and compensation or whether his incapacity should be declared to be permanent, with the corresponding compensation. A similar review of the case

may be made every three months. In no case shall the period for which a worker is entitled to receive 75 per cent. of his wages exceed one year.

Where a worker is still suffering from temporary incapacity after one year, the compensation shall be governed by the provisions relating to permanent incapacity.

429. The compensation which a worker is entitled to receive in respect of permanent total or partial incapacity shall be paid in full without any deduction for the wages paid in the course of treatment.

430. An employer may comply with his obligations under this Part by taking out an insurance at his own expense to cover any workers in respect of whom compensation would be payable, on condition that the amount of the insurance is not less than the amount of compensation.

431. Where the appropriate court considers that the necessary safeguards are provided, an employer may reach agreement with the person or persons who are entitled to compensation that a fixed-term or life annuity equivalent to the compensation due under this Part will be paid in lieu.

432. Transport companies shall ensure that their vehicles carry first-aid kits for use in the event of accidents. Transport and mining companies shall ensure that some of their employees are trained in giving first aid to the injured, and such employees shall in turn be under an obligation to give first aid.

433. Only physicians and surgeons who are legally entitled to practise (or, in their absence, medical students and trained nurses) may be called upon to give treatment to the workers.

434. Where a sick or injured worker refuses with good reason to accept the medical treatment provided by the employer, he shall not forfeit his rights under this Part.

435. The employer shall be required to notify the General Inspectorate of Labour or its representatives and the appropriate labour court of every accident within 24 hours. He shall at the same time or within three days thereafter communicate any data or information at his disposal which may enable the cause of the accident to be determined.

436. For the purpose of the preceding section the employer shall supply the following particulars:

(1) the full name of the injured person;

(2) his occupation;

(3) the time and place of the accident;
(4) the names of any witnesses;
(5) the home address of the injured person;
(6) the place to which he was taken;
(7) the wage the injured person was earning;
(8) the names of any persons to whom compensation is payable in event of death (if known);
(9) the name or style of the undertaking; and
(10) the name and address of the insurance company, if the worker was insured by the employer against employment injuries.

437. In the event of the worker's immediate decease, the employer shall notify the authorities referred to in section 435 as soon as he becomes aware of the accident.

438. The medical practitioners engaged by employers shall have the following duties:

(1) to certify, in the event of an employment injury, whether the worker is capable or incapable of performing the work for which he is employed;
(2) to certify, on the conclusion of medical attendance, whether the worker is fit to resume his work;
(3) to assess the resultant degree of incapacity; and
(4) in the event of death, to issue a death certificate and attest the findings of the post-mortem examination.

439. An employer shall be released from all liability in respect of employment injuries—

(1) where the accident occurs while the worker is in a state of drunkenness, save as provided in the last paragraph of section 413, or is under the influence of a narcotic drug, in which case the employer shall merely be liable for the provision of first aid;
(2) where the injured person deliberately delays his recovery, using illicit procedures for the purpose of increasing the amount of compensation;
(3) where the worker feigns injury;
(4) where the work is not connected with the employer's business;
(5) in the case of homeworkers;
(6) in the case of domestic workers, who shall only be entitled, in the event of illness, to their full wages and to ordinary medical and pharmaceutical care for a period of one month or, in the event of death, to the payment by the employer of the essential funeral expenses;

(7) in the case of family employment or a purely family undertaking, that is to say an undertaking not regularly employing more than five workers who are not members of the family;

(8) in the case of casual workers engaged, for no commercial or industrial purpose, to perform jobs which take less than two weeks to perform or which for some other reason last less than two weeks;

(9) where the incapacity is the result of a quarrel or attempted suicide;

(10) in the case of permanent workers engaged by an undertaking for industrial purposes, where the number of such workers is not more than five and the capital of the undertaking is less than 10,000 lempiras;

(11) in the case of permanent workers engaged for agricultural or stockbreeding purposes: Provided that there shall be no exemption in respect of workers exposed to the dangers of power-driven machinery or equipment, or to related dangers;

(12) where the accident is due to a case of *force majeure* unconnected with the work; and

(13) in the case of workers employed in agricultural transport work with animal-drawn vehicles, save where such vehicles run on rails.

After consulting the Honduran Social Security Institute in every case, the Executive may by decree limit or cancel any of the exceptions contained in the foregoing clauses, having regard to the possibility of, and need for, extending the coverage of insurance against employment injuries to other classes of employed persons.

440. An employer shall not be released from his obligations under this Code by the fact that—

(1) the worker has explicitly or implicitly accepted the hazards of his occupation;

(2) the accident was caused by carelessness or negligence on the part of a fellow worker; or

(3) the accident occurred as a result of the worker's negligence or clumsiness, on condition that there was no premeditation on the worker's part.

In cases covered by clauses (2) and (3) above a worker who has infringed the rules of employment or the safety rules shall be subject to the penalties prescribed in this Code, in the rules of employment or in the agreement or contract.

441. Every employer shall be required to reinstate a worker who has ceased to hold a given post as a result of an employment injury, in so far as the worker is fit for work and on condition

that he has not received compensation for permanent total incapacity and that less than a year has elapsed since his incapacity began.

442. Where a worker is not capable of doing his original job but is capable of doing some other job, the employer shall find him work connected with the same undertaking or business and shall have power to arrange such movements of staff as are necessary for the purpose.

443. In cases where he has to reinstate a worker in his original post in accordance with section 441, the employer shall be entitled to dismiss the worker's substitute without compensation.

444. The existence of a previous affection (such as an allergy, defect, dyscrasia, poisoning or chronic illness) shall not justify a reduction of the compensation.

445. In no case shall an employer be obliged to pay an amount exceeding that corresponding to permanent total incapacity, even where more than two disabilities exist together.

446. Any doubt as to whether incapacity is temporary or permanent shall be settled by experts (who shall be two physicians, one appointed by each party) or, if these fail to agree, by decision of the head or representative of the Faculty of Medicine, the director of any of the hospitals of the Republic or the medico-legal expert.

447. If feasible and necessary a post-mortem examination shall be carried out to determine the cause of death in the event of a fatal employment accident or occupational disease.

448. The labour authority competent to consider claims for compensation in respect of employment injuries shall make the necessary arrangements to ensure that the employer pays the appropriate compensation to the injured worker or his heirs and to commute the pensions payable under this Division for a capital sum representing the immediate surrender value whenever the object of the commutation is

(1) to pay for the vocational retraining of the injured worker;

(2) to acquire real or personal property for such a worker;

(3) to set up a workshop, undertaking or business which the injured worker has the necessary abilities to run; or

(4) to pay the corresponding expenses if the injured worker is an alien who has no outstanding liabilities in the Republic and is leaving it with no intention of returning.

The labour authority granting permission for the commutation shall first satisfy itself that the commutation is both necessary and desirable, having regard to the interests of the injured worker, and shall grant such permission only in respect of such amount as is essential to achieve the purpose stated in the application.

449. An employer who so desires may apply to the labour authority for permission to deposit the amount of the compensation to the order of the beneficiary with the Honduran Social Security Institute, for payment in accordance with this Code.

450. Where an injured person is summoned to appear before a labour court, the employer shall accept liability for any travelling and living expenses incurred, or time lost, by the worker and, if his condition so requires, by those accompanying him.

451. The authority or court examining a case may at any time, either at the request of either of the parties or on its own initiative, and as long as the liability for compensation has not been decided, order at its discretion and in the light of the evidence submitted and the merits of the case as reflected in the record that the injured worker or his heirs shall be paid a temporary pension within the limits of the compensation or pensions prescribed in this Division, without prejudice to the possibility of reimbursement by the beneficiary if the defendant is cleared of liability and the beneficiary acted in bad faith in presenting his case.

Where a labour court to which a final decision has been referred for opinion or on appeal finds that such a course is justified, it shall also order on its own initiative that such a provisional pension shall be paid, if the judge has not yet so ordered and a decision on the case is pending owing to some measure taken on the order of the court for a better settlement of the case or for some other similar reason. Payment of the pension may be secured by the procedure for the execution of court decisions.

452. The compensation to which this Part relates may not be assigned, set off or pledged, nor may it be attached save to the extent of one half for the purpose of ensuring maintenance payments. A court shall dismiss any claim to the contrary.

453. The right to claim compensation and any action taken in virtue of that right shall be barred by limitation after one year reckoned from the date on which the injury occurred:

Provided that if a worker who is not insured against employment injuries continues to work for the same employer without claiming the appropriate compensation, or if an employer continues to credit an injured worker or his heirs with the whole or part of his wage, the period of limitation shall be two years.

454. The following table shall be used for the purposes of this Part:

INCAPACITY ASSESSMENT TABLE

Loss	Percentage
Upper Limb	
1. Loss of arm at shoulder	65 80
2. Loss of arm between elbow and shoulder	60 75
3. Loss of arm at elbow	55 70
4. Loss of forearm between wrist and elbow	50 65
5. Loss of hand at wrist	50 65
6. Loss of four fingers of hand, including thumb and corresponding metacarpals (even if loss of latter is not complete)	50 60
7. Loss of four fingers of hand, not including thumb	40 50
8. Loss of thumb with corresponding metacarpal	20 30
9. Loss of thumb only	15 20
10. Loss of one phalanx of thumb	10
11. Loss of index finger with all or part of corresponding metacarpal	10 15
12. Loss of index finger	8 12
13. Loss of first phalanx with loss or mutilation of second phalanx of index finger	6
14. Loss of middle finger with loss or mutilation of all or part of metacarpal	8
15. Loss of middle finger	6
16. Loss of first phalanx with mutilation of second phalanx of middle finger	4
17. Loss of first phalanx only of middle finger	1
18. Loss of ring finger or little finger with loss or mutilation of all or part of metacarpal	7
19. Loss of ring finger or little finger	5
20. Loss of first phalanx with mutilation of second phalanx of ring finger or little finger	3
21. Loss of first phalanx of ring finger or little finger	1
If the injured limb is the one less used, the compensation calculated in accordance with this table shall be reduced by 15 per cent.	
Lower Limb	
22. Total loss of lower limb, where an artificial limb cannot be used	65 80
23. Loss of thigh, where an artificial limb can be used	50 70
24. Loss of leg at knee	50 65
25. Mutilation of leg between knee and ankle	45 60
26. Loss of foot at ankle	30 50
27. Mutilation of foot without loss of heel	20 35
28. Loss of great toe with mutilation of metatarsal	10 25
29. Loss of fifth toe with mutilation of metatarsal	10 25
30. Loss of great toe	3

		Percentage
31.	Loss of two phalanges of great toe	2
32.	Loss of toe other than great toe	1
33.	Loss of two phalanges of any toe other than great toe	1

Ankylosis

Arm

34.	Of shoulder affecting propulsion and abduction	8–30
35.	Complete ankylosis of shoulder allowing mobility of shoulder-blade	20–30
36.	Complete ankylosis of shoulder with immobility of shoulder-blade	25–40
37.	Complete ankylosis of elbow comprising all joints in flexed (favourable) position between 110 and 75 degrees	15–25
38.	Complete ankylosis of elbow comprising all joints in extended (unfavourable) position, between 110 and 180 degrees	30–40
39.	Of wrist affecting its movements (depending on degree of mobility of fingers)	15–30

Thumb

40.	Carpo-metacarpal joint	5–8
41.	Metacarpo-phalangeal joint	5–10
42.	Interphalangeal joint	2–5

Index Finger

43.	Metacarpo-phalangeal joint	2–5
44.	First interphalangeal joint	4–8
45.	Second interphalangeal joint	1–2
46.	Last two joints	5–10
47.	All three joints	8–12

Middle Finger

48.	Metacarpo-phalangeal joint	3
49.	First interphalangeal joint	1
50.	Last two joints	6
51.	All three joints	8

Ring Finger and Little Finger

52.	Metacarpo-phalangeal joint	2
53.	First interphalangeal joint	3
54.	Second interphalangeal joint	1
55.	Last two joints	4
56.	All three joints	5

Lower Limb

57.	Of ilio-femoral joint	10–40
58.	Of ilio-femoral joint in unfavourable position (flexion, abduction, rotation)	15–55

		Percentage	
59.	Of both ilio-femoral joints	50	90
60.	Of knee in favourable position, in complete or nearly complete extension up to 135 degrees	5	15
61.	If knee in unfavourable position, with flexion from 135 degrees to 30 degrees	10	50
62.	Of knee in *genu valgum* or *varum*	10	35
63.	Of tibio-tarsal joint at right angles, without deformation of foot, with adequate movement of corresponding joints	5	10
64.	Of tibio-tarsal joint at right angles, with deformation or atrophy hampering the movement of the corresponding foot joints	15	30
65.	Of foot in defective position	20	45
66.	Of toe joints	0	1

Pseudarthrosis

Arm

67.	Of shoulder (result of extensive resections or considerable loss of bone substance)	8	35
68.	Of humerus, rigid	5	25
69.	Of humerus, flaccid (tip of elbow bone)	10	45
70.	Of elbow	5	25
71.	Of forearm, one bone, rigid	0	5
72.	Of forearm, both bones, rigid	10	45
73.	Of forearm, one bone, flaccid	10	50
74.	Of forearm, both bones, flaccid	10	45
75.	Of wrist (result of extensive resections or considerable loss of bone substance)	10	20
76.	Of metacarpus, all bones	10	20
77.	Of one metacarpal bone	1	5

Ungual Phalanx

78.	Of thumb	1	
79.	Of other fingers	1	

Other Phalanges

80.	Of thumb	8	
81.	Of index finger	5	
82.	Of any other finger	2	

Lower Limb

83.	Of hip (result of extensive resections and considerable loss of bone substance)	20	60
84.	Of femur	10	60
85.	Of knee with loose leg-bone (result of resection of knee)	10	50
86.	Of knee-cap, with long fibrous callus	10	20
87.	Of knee-cap, with short osseous or fibrous callus	5	10
88.	Of tibia and fibula	10	30

		Percentage
89.	Of tibia only	5–15
90.	Of fibula only	4–10
91.	Of first or last metatarsal	3–5

Retractile Scars

92.	Of armpit, where arm is left in complete abduction	20–40
93.	In bend of elbow, where flexion is possible between 110 and 75 degrees	15–25
94.	Same, in acute flexion from 45 to 75 degrees	20–40
95.	Of palmar aponeurosis with rigidity in extension or flexion	5–8
96.	Of palmar aponeurosis with rigidity in pronation or supination	5–10
97.	Of palmar aponeurosis with combined rigidities	10–20
98.	Scars in popliteal cavity, in extension from 135 to 180 degrees	10–25
99.	Scars in popliteal cavity, in flexion between 135 and 30 degrees	10–50
100.	Of neck, restricting movement of the head	40–60

Functional Difficulty of Fingers Due Not to Articular Injuries but to Resections or Loss of Tissue of Extensor or Flexor Tendons, Adhesions or Scars

Permanent Flexion of Finger

101.	Thumb	5–10
102.	Any other finger	3–5

Permanent Extension of Finger

103.	Thumb	8–12
104.	Index finger	5–8
105.	Any other finger	3–5

Fibrous Calluses or Badly United Fractures

106.	Of humerus, causing muscular deformation and atrophy	5–20
107.	Of olecranon, causing a short osseous, fibrous callus	1–5
108.	Of olecranon, causing a long fibrous callus	5–15
109.	Of olecranon, causing considerable atrophy of triceps owing to a very long fibrous callus	10–20
110.	Of forearm bones, impeding movements of the hand	5–15
111.	Of forearm bones, causing limitation of pronation or supination movements	5–15
112.	Of clavicle, causing rigidity in shoulder	5–15
113.	Of hip, causing rigidity of lower limb	10–40
114.	Of femur, with shortening of 1-4 centimetres, without injuries to joints or muscular atrophy	5–10
115.	Of femur, with shortening of 3-6 centimetres, with moderate muscular atrophy but no articular rigidity	10–20

		Percentage
116.	Of femur, with shortening of 3-6 centimetres and permanent articular rigidity	15–30
117.	Of femur, with shortening of 6-12 centimetres, muscular atrophy and articular rigidity	20–40
118.	Of femur, with shortening of 6-12 centimetres, outward angular deflection, permanent muscular atrophy and flexion of knee not exceeding 135 degrees	40–60
119.	Of neck of femur, whether due to surgical or anatomical causes, accompanied by shortening exceeding 10 centimetres, outward angular deflection and articular rigidity	50–75
	Of Tibia and Fibula	
120.	With shortening of 3-4 centimetres, large and protruding callus	10–20
121.	Angular union with inward or outward deflection of leg, secondary deflection of foot with shortening exceeding 4 centimetres, ability to walk	30–40
122.	Angular union or considerable shortening, inability to walk	45–60
	Malleolar	
123.	With inward displacement of foot	15–35
124.	With outward displacement of foot	15–35
	Complete Paralysis Due to Injury of Peripheral Nerves	
125.	Total paralysis of upper limb	50–70
126.	Caused by injury to subscapular nerve	5–10
127.	Caused by injury to circumflex nerve	10–20
128.	Caused by injury to musculo-cutaneous nerve	20–30
129.	Caused by injury to median	20–40
130.	Caused by injury to median, with causalgia	40–70
131.	Caused by injury to ulnar nerve, if injury at elbow level	20–30
132.	Caused by injury to ulnar nerve, if injury in hand	10–20
133.	Caused by injury to radial nerve, if injured above branch of triceps	30–40
134.	Caused by injury to radial nerve, if injured below branch of triceps	20–40
135.	Total paralysis of lower limb	30–50
136.	Caused by injury to external popliteal sciatic nerve	15–25
137.	Caused by injury to internal popliteal sciatic nerve	15–25
138.	Caused by injury to internal popliteal sciatic nerve, with causalgia	30–50
139.	Caused by combined injuries to both limbs	20–40
140.	Caused by injury to crural nerve	30–40
141.	If the injured limb is the one less used, the compensation calculated in accordance with this table shall be reduced by 15 per cent.	
142.	In cases where prior to accident the injured limb was not physiologically and anatomically sound, compensation shall be reduced proportionately.	
143.	In the case of musicians, typists and linotype operators the compensation for loss, ankylosis, pseudarthrosis, paralysis,	

		Percentage
	cicatricial retractions and rigidity of middle, ring and little fingers, or retractions of the palmar aponeurosis of the hand involving the said fingers, shall be increased up to a figure not exceeding 200 per cent.	

Head Injuries

Cranium

144.	For injuries to cranium not leaving physical or functional disorders or disabilities compensation shall consist only of medical attention and medicines. For injuries causing fracture of cranium compensation shall be proportionate to the resultant incapacity.	
145.	Causing total upper monoplegia	50-70
146.	Causing total lower monoplegia	30-50
147.	Total lower paraplegia, without sphincteral complications	60-80
148.	Same, with sphincteral complications	60-90
149.	Total hemiplegia	60-80
150.	Leaving aphasia and agraphia	10-50
151.	Traumatic epilepsy not curable by operation, where it is duly proved that the fits permit some form of work	40-60
152.	Traumatic epilepsy, where frequency of fits and other phenomena causing permanent total incapacity render all work impossible	100
153.	Injuries to common oculomotor nerve or external oculomotor nerve, causing partial incapacity	10-20
154.	Injuries to facial or trigeminal nerve	5-20
155.	Injuries to vagus nerve (depending on extent of functional disorders proved to exist)	0-40
156.	Of hypoglossal nerve, when unilateral	5-10
157.	Same, bilateral	30-50
158.	Diabetes mellitus or insipidus	15-30
159.	Chronic dementia	100

Face

160.	Extensive mutilation, including superior maxillaries and nose, according to loss of mucous membrane	80-90
161.	Superior maxillary, pseudarthrosis with inability to masticate	40-50
162.	Same, with limited ability to masticate	10-20
163.	In event of prosthesis improving mastication	0-10
164.	Loss of substance, palatine arch, depending on place and extent of loss and, in event of prosthesis, proved functional improvement	5-25
165.	Inferior maxillary, pseudarthrosis with or without loss of substance, after failure of surgical action, where pseudarthrosis is very flaccid and mastication is hampered, very inadequate or totally impossible	40-50
166.	Where very rigid in ascending ramus	1-5
167.	Where flaccid in ascending ramus	10-15
168.	Where very rigid in horizontal ramus	5-10
169.	Where flaccid in horizontal ramus	15-25

		Percentage
170.	Where rigid in symphysis	10 15
171.	Where flaccid in symphysis	15 25
172.	In event of prosthesis, when functional improvement has been proved, 10 per cent. less.	
173.	Defective union, where incisors or molars do not articulate, thereby limiting mastication	10 20
174.	Where articulation is partial	0 10
175.	Where mastication corrected by prosthetic appliance	0 5
176.	Loss of tooth: replacement.	
177.	Total loss of teeth	10 20
178.	Scar tissue limiting opening of mouth, hampering buccal hygiene, speech, mastication, or allowing escape of saliva	10 20
179.	Irreducible dislocation of temporo-maxillary joint, according to extent of functional impediment	10 25
180.	More or less extensive amputations of tongue with adhesions and according to extent to which speech and deglutition are impeded	10 30

Eye Injuries

181.	Loss of both eyes	100
182.	Loss of one eye	50
183.	Concentric narrowing of field of vision, with conservation of 30 degrees in one eye	10
184.	Same, in both eyes	10 20
185.	Concentric narrowing of field of vision, with vision of 10 degrees or less in one eye	10 15
186.	Same, in both eyes	50 60

Permanent Diminution of Visual Acuity (after Correction)

Serial No.	Acuity of affected eye (where normal eye = 1)	Percentage	
		Occupation not requiring particular visual acuity	Occupation requiring visual acuity
187.	0	25	35
188.	0.05	20 25	30
189.	0.1	20	25 30
190.	0.2	15	20
191.	0.3	10	15
192.	0.5	5	10
193.	0.6	0	5
194.	0.7	0	0

195. In cases of bilateral diminution of visual acuity the percentage of incapacity of each eye shall be calculated as though the vision of the other were normal.

196. For the purposes of subsequent claims for loss of visual acuity an employee shall be considered on engagement to have normal vision if he has 0.7 in each eye.

		Percentage
	Vertical Hemianopia	
197.	Right or left homonymous	10–20
198.	Nasal heteronymous	5–10
199.	Temporal heteronymous	20–40
	Horizontal Hemianopia	
200.	Superior	5–10
201.	Inferior	40–50
202.	Quadrantic	5–10
203.	Diplopia	10–20
204.	Unilateral internal ophthalmoplegia	5–10
205.	Bilateral internal ophthalmoplegia	10–20
206.	Disorders of palpebral borders (entropion, ectropion, symblepharon)	0–10
207.	Epiphora	0–10
208.	Lachrymal fistulas	10–20
	Nose Injuries	
209.	Mutilation of nose, without nasal stenosis	0–3
210.	Same, with nasal stenosis	5–10
211.	Where nose reduced to cicatricial stump, with serious nasal stenosis	10–40
	Ear Injuries	
212.	Total unilateral deafness	20
213.	Total bilateral deafness	60
214.	Partial unilateral deafness	5–10
215.	Partial bilateral deafness	15–30
216.	Deafness total in one ear, partial in other	20–40
217.	Duly proved traumatic labyrinthine vertigo	20–40
218.	Loss or excessive deformation of pinna of one ear	0–5
219.	Same of both ears	3–10
	Injuries to Vertebral Column	
220.	Persistent deflections of head and trunk with considerable hampering of movement	10–25
221.	Same, with permanent rigidity of vertebral column	10–25
222.	Injury with medullary lesion and inability to walk	100
223.	Injury with medullary lesion, accompanied by sphincterial disorders only	10–50
224.	Where walking possible with aid of crutches	70–80
	Injuries to Larynx and Trachea	
225.	Cicatricial contraction, causing dysphonia	5–15
226.	Causing dyspnoea of effort	5–10

		Percentage
227.	Where dyspnoea entails permanent use of tracheal cannula	50 60
228.	Dysphonia and dyspnoea existing together	15 40

Injuries to Thorax

229.	Incapacity caused by injuries to sternum, where these lead to deformation or functional disorders of thoracic or abdominal organs	1 20
230.	Fracture of ribs, where resulting in some functional disorder of thoracic or abdominal organs	1 60

Injuries to Abdomen

231.	Incapacity proved to be due to lesions of abdominal organs caused by an employment injury	20 60
232.	Irreducible dislocation of pubis or internal relaxation of pubic symphysis	15 30
233.	Fracture of ischiopubic ramus or of pubic bone resulting in incapacity of any kind, vesical disorders or inability to walk	30 50
234.	Severe scars on abdominal wall causing incapacity	1 15
235.	Inoperable fistulae in alimentary canal or appendages, causing incapacity	10 50

Injuries to Genito-Urinary Apparatus

236.	Post-traumatic, incurable urethral obstructions necessitating micturition by means of perineal or hypospadiac meatus	50 80
237.	Total loss of penis necessitating micturition by artificial meatus	50 90
238.	Loss of both testicles, in persons under 20	90
239.	Loss of one testicle, in persons under 20	30 40
240.	Same, in persons over 20	20 60
241.	Uterine prolapse proved to be due to employment accident and inoperable	50 60
242.	Loss of breast	10 20

Miscellaneous Injuries

243.	Mental derangement resulting from an accident and appearing within six months of the occurrence	100
244.	Loss of both eyes, loss of both arms above elbow, loss of both legs at hip, loss on same side of arm above elbow and leg above knee, medullary lesion due to any injury causing total paralysis of lower limbs, and incurable mental derangement shall be regarded as total permanent incapacity	100
245.	Compensation for disfigurement shall be fixed at the discretion of the labour judge, but if the injured person's working capacity is in any way diminished a medical practitioner shall be consulted, who shall with due regard to the person's occupation determine the amount of compensation.	

455. The following table shall be used for the purposes of this Part:

TABLE OF OCCUPATIONAL DISEASES

Infectious or Parasitic, Toxic and Physically Transmitted Diseases

I. *Anthrax*: Tanners, ragmen, wool-carders, shepherds, furriers and persons handling horsehair, bristle, horn, flesh and bones of cattle.

II. *Glanders*: Grooms, stable-boys and tenders of equine animals.

III. *Brucellosis*: Work in abattoirs, butchers' shops, sausage factories, dairies, sewers, drains and laboratories, and work involving a risk of contact with infected animals.

IV. *Ankylostomiasis*: Miners, brickmakers, pottery workers, gardeners and earth and sand workers.

V. *Actinomycosis*: Bakers, agricultural workers and millers of wheat, barley, oats and rye.

VI. *Leishmaniasis*: Chicle, rubber and vanilla workers, and woodcutters in tropical regions.

VII. *Syphilis*: Glass blowers (primary stage: buccal chancre), doctors, nurses and operating-theatre attendants (on the hands).

VIII. *Anthracosis*: Coal miners, charcoal burners, stokers and chimney sweeps.

IX. *Tetanus*: Grooms, butchers, stable-boys and cattle-men.

X. *Silicosis*: Miners (in mineral and metal mines), quarrymen, lime burners, workers in cement factories, grinders, masons, sanders and workers in porcelain factories.

XI. *Tuberculosis*: Doctors, nurses, operating-theatre attendants, butchers and, where silicosis or anthracosis has already existed, miners, stokers and engine-drivers.

XII. *Siderosis*: Ironworkers (filers, turners and persons handling iron oxide).

XIII. *Tabacosis*: Workers in the tobacco industry.

XIV. *Other forms of pneumoconiosis*: Carpenters, workers in the cotton, wool, jute, silk, hair and feather industries, painter's blowlamp operators, painters and spray-gun operators.

XV. *Dermatosis*: Sugarcane reapers, vanilla workers, flax spinners and gardeners.

XVI. *Dermatitis caused by physical agents*:

Heat: Blacksmiths, smelters, glassworkers and motor vehicle drivers.

Cold: Persons working in cold stores.

Solar radiation: Open-air workers.

Electro-magnetic radiations: Persons working with X-rays.

Ionising radiations: Persons working with radium.

XVII. *Other forms of dermatitis*: Persons handling paints composed of vegetable dyes with a metallic salt or aniline base, cooks, dish washers, washerwomen, miners, cloth bleachers, persons handling spices, photographers, masons, quarrymen, cement workers, cabinet makers, varnishers, degreasers of rags, fullers, persons bleaching cloth by means of sulphur fumes, tawers, persons spinning or collecting wool, persons manufacturing chlorine by electrical decomposition of sodium chloride and persons handling petroleum and gasoline.

XVIII. *Other physical agents causing disease*:

Dampness: Persons working in wet places, e.g. rice sowers.

Compressed air and confined spaces: Divers, miners and persons working in badly ventilated places (apart from places where noxious gases are produced).

Eye and Ear Diseases

XIX. *Electrical ophthalmia*: Electricians and oxy-acetylene welders.

XX. *Other forms of ophthalmia*: Persons working in high temperatures, glassmakers, tinsmiths, blacksmiths, etc.

XXI. *Sclerosis of middle ear*: Workers engaged in copper rolling and in grinding minerals.

Other Affections

XXII. *Housemaid's knee*: Persons habitually working in a kneeling position.

XXIII. *Occupational cramp*: Clerks, pianists, violinists and telegraphists.

XXIV. *Occupational deformities*: Shoemakers, carpenters and masons.

Occupational Poisoning

XXV. *Ammonia*: Persons engaged in distilling coal or preparing agricultural fertilisers, latrine cleaners, well-sinkers, miners, ice-makers and printers.

XXVI. *Hydrofluoric acid*: Glassmakers and engravers.

XXVII. *Chlorous fumes*: Persons engaged in preparing chloride of lime, hydrochloric acid, chlorine or soda, or engaged in bleaching.

XXVIII. *Sulphur dioxide*: Persons engaged in the manufacture of sulphuric acid, dyeing and the making of coloured paper and prints.

XXIX. *Carbon monoxide*: Boiler makers, smelters of minerals and metals (in blast furnaces) and miners.

XXX. *Carbon dioxide*: As for carbon monoxide, with the addition of well-sinkers and latrine cleaners.

XXXI. *Arsenic, arsenical poisoning*: Workers in the arsenic plants of mineral and metal foundries, dyers and others handling arsenic.

XXXII. *Lead, saturnism*: Mineral and metal foundry workers, painters using white lead, printers, tin-can makers and others handling lead and its derivatives.

XXXIII. *Copper*: Workers extracting copper or using any of its salts.

XXXIV. *Mercury, hydrargism*: Mercury miners and others handling this metal.

XXXV. *Hydrogen sulphide*: Miners, cistern cleaners, sewermen, cleaners of retorts, gasholders and industrial furnaces and pipe systems, persons engaged in manufacturing lighting gas and vintners.

XXXVI. *Nitrous fumes*: Workers in nitric acid factories and engravers.

XXXVII. *Carbon bisulphide*: Persons engaged in manufacturing carbon bisulphide, in vulcanising rubber and in extracting fats and oils.

XXXVIII. *Hydrocyanic acid*: Miners, mineral and metal foundry workers, photographers and workers using indigo dyes and manufacturing soda.

XXXIX. *Colouring essences, petroleum solvents*: Persons engaged in the manufacture of colouring materials and perfumes.

XL. *Hydrocarbons*: Persons engaged in distilling coal and petroleum, preparing varnish and all forms of petroleum and its derivatives, coal miners, workers in the oil industry, motor vehicle drivers, etc.

XLI. *Alkaline chromates and bichromates*: Persons engaged in the preparation of chrome colouring materials; in the manufacture of wall-paper, coloured pencils, inks and dyes; in the preparation of chrome and its compounds; in the manufacture of fuses,

explosives, gunpowder, smokeless powder and matches; textile workers engaged in waterproofing cloth.

XLII. *Epithelial cancer*: Caused by paraffin, tar and like substances.

456. The tables contained in the last two preceding sections may be amended or supplemented at any time by decree of the Executive.

457. Only the following types of hernia shall confer entitlement to compensation for temporary incapacity:

(a) those developing suddenly as a result of a violent injury sustained at work, causing ruptures or lacerations of the abdominal wall or diaphragm and accompanied by an acute and manifest abdominal syndrome; and

(b) those occurring in workers who are predisposed thereto, as a result of an injury or a violent, unforeseen effort which is abnormal in the work habitually performed by the injured person.

458. Where the employer or insurance carrier does not consider that a hernia is one of those mentioned in the preceding section, the judge, before fixing the degree of incapacity caused thereby, shall call for a medical report, which shall be completed within the shortest possible time. The report shall as far as practicable cover at least the following points:

(a) the medical history of the person examined and the findings of any previous examinations;

(b) the circumstances of the accident, as reported by the injured person and fully confirmed by witnesses (if any), with an indication of the nature of the employment, the injured person's exact position at the moment of the accident, whether or not he had been ordered to make the effort which is considered to have caused the hernia, and the nature of the said effort;

(c) the symptoms noted at the time of the accident and during the next few days, and particularly whether sudden pain accompanied the accident, the position and nature of the pain, whether immediate medical attention was required, and the time (if any) for which the patient was kept away from work; and

(d) the characteristics of the hernia (those revealed by a thorough examination of the functional condition of the affected part and of the abdominal wall and those, if any, deduced from later examinations of the injured person).

459. In special cases of employment injury where, in view of the injured person's occupation or type of work and the organ or part of the body affected, the injury or loss sustained by the

worker is not provided for in this Part, the amount of compensation shall be determined by the competent authority after consultation with three physicians employed by the State. No charge shall be made to the parties.

Part VI. Social Organisations

Chapter I. General Provisions

460. The legal establishment of social organisations, namely trade unions and co-operatives, is hereby declared to be in the public interest as one of the most effective ways of contributing to the maintenance and development of the national economy and of culture and democracy in Honduras.

461. It shall be absolutely prohibited for any social organisation to engage in any activities that are not intended to promote its social and economic interests.

462. No social organisation may confer privileges or special benefits on its founders or officers, except those which are inherent in the duties they perform; every organisation shall be governed by the democratic principles of majority decision, secret ballots or open voting, and the rule of one member, one vote, no advantage whatsoever being granted on the basis of the number of shares or contributions or the amount of capital that any particular member has subscribed.

463. The members of a co-operative society shall not form a trade union for the purpose of defending their interests vis-a-vis the said society: Provided that workers may form a trade union within such a society if it acts as their employer.

464. Legally constituted social organisations shall be exempt from national and municipal taxes on their property, shall be endowed with legal personality and shall have capacity to exercise rights and to incur contractual obligations.

The advantages deriving from legal personality shall not be used for purposes of gain: Provided that they may be so used if the organisation's essential objective of ensuring the greatest common benefit to its members is thereby furthered.

465. The Ministry of Labour and Social Welfare shall be responsible, through the General Inspectorate of Labour, for exercising the strictest supervision over social organisations, with the sole object of ensuring that they operate in accordance with the law.

To this end social organisations shall submit to such inspection and supervision as needs to be exercised by the labour authorities to satisfy themselves that the provisions of this Code, the regulations made thereunder and the related laws are being imple-

mented, and shall furnish such reports as these authorities may request for the purpose.

466. The only penalties to which social organisations may be liable are fines (where incurred in accordance with this Code) and dissolution (in the cases expressly mentioned in this Part):

Provided that their officers shall be liable under labour legislation and the ordinary law for all contraventions or misdemeanours committed in the discharge of their duties.

467. Every workers' organisation shall enjoy the protection of the State if it pursues any of the following objectives:

(1) vocational training;

(2) general education or education adapted to the particular branch of employment;

(3) mutual aid through the creation of co-operatives or savings funds;

(4) any other purpose connected with the economic or social betterment of the working population or the defence of their class interests.

Chapter II: Trade Unions

468. The expression "trade union" means any permanent association established by workers, employers or persons engaged in a liberal profession or independent occupation for the sole purpose of studying, improving and protecting the common economic and social interests of the members.

Protection of the Right of Association

469. No person may prejudice the right of trade union association.

Any person who, by using threats or violence, prejudices the right of free trade union association in any manner whatsoever shall be liable to a fine of from 200 to 2,000 lempiras, which shall be imposed by the competent labour official after a full investigation of the facts. Where the person concerned is found guilty of a criminal offence and is sentenced to a pecuniary penalty, the aforementioned fine shall be returned.

Activities for Purposes of Gain

470. No trade union may run any business or undertake any activity for purposes of gain.

Classification of Workers' Trade Unions

471. Workers' trade unions shall be classified as follows:

(a) works (or basic) unions, composed of persons having different occupations, trades or skills but working in the same undertaking, establishment or institution;

(b) industrial unions, composed of persons working in different undertakings belonging to the same branch of industry;

(c) craft unions, composed of persons having the same occupation, trade or skill;

(d) general unions, composed of persons working in different, dissimilar or unconnected occupations. This last type of union may be formed only in places where the number of workers engaged in the same activity, occupation or trade is insufficient to warrant the formation of a craft union, and may exist only for such time as such a situation obtains.

The foregoing classification shall, in so far as it is relevant, also apply to employers' associations.

Works or Basic Unions

472. Works or basic unions shall normally represent their members in all labour relations, submit claims, appoint disciplinary tribunals, grievance committees and negotiators from among their own members, nominate conciliators and arbitrators as required, and conclude collective contracts and agreements with due regard for the occupational interests of their members. Accordingly, not more than one works or basic union may exist within a given undertaking, institution or establishment at any given time; and if for any reason more than one such union does exist, the union having the largest number of members shall be retained, the members of the others being admitted to membership without further formality.

473. Workers shall be free to join and to withdraw from their trade unions. The by-laws shall make provision for the conditions of membership, the repayment of subscriptions or contributions to members who withdraw or are expelled and the participation of members in mutual benefit schemes organised by the union with the help of members' contributions.

The by-laws may place restrictions on the admission of senior employees to works or basic unions.

474. No collective agreement may contain a clause whereby a worker who omits or ceases to be a member of a union is precluded from working in the undertaking concerned.

CHAPTER III. ORGANISATION

475. To be established and continue to exist, a workers' trade union must have not less than 30 members and an employers' association not less than five independent employers.

At least 90 per cent. of the members of every trade union organisation must be Honduran nationals.

476. Any person over 16 years of age may be a member of a trade union. Any person over 14 years of age may also be a member of a union, subject to the express consent of his legal representative.

No person may be a member of two or more unions of the same type or for the same activity at any given time.

477. The founders of a trade union shall draw up articles of association at the constituent meeting; in them they shall state their names, nationality, the numbers of their identity cards, their addresses, the occupation in which they are engaged and which brings them together, the name, purpose and type of the association, and any other information that they consider necessary; the articles shall be signed by all participants who are able to do so.

At the constituent meeting or later, the by-laws of the union shall be discussed and approved and the provisional officers, consisting of at least a chairman, a vice-chairman and a secretary, shall be appointed. A provisional treasurer and comptroller shall also be appointed.

The provisional chairman and secretary shall be responsible for all formalities involved in obtaining recognition of the union's legal personality.

478. The by-laws shall contain provisions as to

(1) the name, purpose, type and registered office of the trade union;

(2) the conditions of membership;

(3) the rights and obligations of members;

(4) the disciplinary penalties, the grounds for the expulsion of members and the procedure to be followed in such cases, which shall invariably provide for a hearing of the person concerned;

(5) the amount and frequency of the ordinary contributions and the manner of their payment;

(6) the procedure for instituting and collecting special contributions;

(7) the intervals between ordinary and extraordinary general and branch meetings, the procedure for convening them, the standing orders to be applied and rules for the quorum, discussions and votes;

(8) the number, titles, period of office and duties of members of the central and branch committees, the method of appointing or electing them, the rules governing their meetings and the grounds and procedure for removing them from office;

(9) the rules for the management of the union's property and funds, the preparation and appropriation of estimates, the presentation of the balance-sheet and the closing of accounts;

(10) the time and manner of presenting and proving the accounts;

(11) the organisation of standing and *ad hoc* committees;

(12) the reserve funds that may be set up in appropriate cases for the payment of benefits, and the rules for the grant of such benefits to members;

(13) the rules for the dissolution and liquidation of the union and the procedure for the revision and amendment of the by-laws;

(14) any other provisions that are considered necessary for the working of the union.

479. The provisional chairman and secretary of every workers' trade union shall, on its formation, give notice in writing to the appropriate labour inspector or, where there is no such inspector, to the local mayor, of the desire of the group of workers to set up a trade union, at the same time indicating the names and particulars of all the founder members and all the members of the provisional managing committee, the type and purpose of the union and, where appropriate, the undertaking, establishment or institution where the workers are employed.

Chapter IV. Legal Personality

480. A trade union organisation shall be deemed to be lawfully constituted and to have legal personality as from the date on which it is registered with the Ministry of Labour and Social Welfare.

481. For a trade union to be registered and recognised as having legal personality, the provisional committee shall make application, either directly or in the person of a duly authorised representative, to the Ministry of Labour and Social Welfare, through the General Directorate of Labour; the application shall be accompanied by the following documents, all of which shall be drawn up on unstamped paper:

(1) a certified copy of the articles of association, together with the signatures of the participants or the persons signing on their behalf, and the particulars of their identity cards;

(2) a certified copy of the minutes recording the election of the provisional managing committee, with the same additional details as are specified in clause (1);

(3) a certified copy of the minutes of the meeting at which the by-laws were adopted;

(4) the power of attorney of the person making application for the recognition of the union's legal personality, where such application is not made by the provisional managing committee. The aforesaid power of attorney must be certified in the presence of the competent authority;

(5) two certified copies of the articles of association, drawn up by the provisional secretary;

(6) two copies of the by-laws of the trade union, drawn up by the provisional secretary;

(7) a list, in triplicate, of the names of the provisional managing committee, indicating the nationality, occupation or trade, identity card number and address of each office-bearer;

(8) a complete list, in triplicate, of the names of the members of the trade union, indicating the nationality, sex and occupation or trade of each of them;

(9) confirmation by the competent labour inspector that no other trade union exists (in the case of a works or basic union, where there might be duplication), that the founder members are employers or workers in the industry or activity concerned or that they belong to a profession or occupation covered by the union, that the provisional officers have worked for a certain time in the activity concerned (if such is the case), and that any other relevant matters are as stated. Where there is no labour inspector, the confirmation shall be issued by the local mayor and countersigned by the nearest labour inspector.

The documents mentioned in clauses (1), (2) and (3) may be combined in a single text.

482. On receipt of the application, the General Directorate of Labour shall have 15 days to check the accompanying documents, examine the by-laws, make any relevant comments to the applicants and submit a report on the case to the competent Ministry so that appropriate action can be taken.

483. The Ministry of Labour and Social Welfare shall recognise the trade union as having legal personality, save where its by-laws conflict with the Constitution of the Republic or with any law, are offensive to common decency or infringe any special provisions of this Code.

Within a fortnight of receiving the file, the Ministry shall take a decision recognising or refusing to recognise the union's legal personality; in the latter event it shall indicate the legal reasons or provisions of this Code that motivated its decision.

484. If the documents do not conform to the requirements of section 481, a decision shall be taken indicating the mistakes or omissions, so that the applicants may rectify them or request a reconsideration of the matter within two months.

In this case the period of 15 working days mentioned in the preceding section shall run from the day on which the amended application is presented.

Reconsideration of the matter shall be completed within ten working days of the submission of the appeal.

485. Once the union has been registered, the General Directorate of Labour shall, on request, issue a certificate to that effect and shall order an extract of it to be published free of charge in three successive issues of *La Gaceta*; the registration shall take effect from the date of the last publication.

486. As soon as the decision recognising the legal personality of a union has been published, the union concerned shall transmit a copy of the issue of *La Gaceta* in which the publication appears to the General Directorate of Labour.

487. All amendments to the by-laws shall be adopted by a general meeting of the trade union and sent to the Ministry of Labour and Social Welfare and the General Directorate of Labour, together with two copies of the minutes of the general meeting, showing the amendments made. The General Directorate of Labour shall give an opinion within 15 days and the Ministry shall approve or reject the amendments within an equal period, indicating in the latter case its legal reasons for so doing.

488. No amendment to the by-laws of a trade union shall be valid without the approval of the Ministry of Labour and Social Welfare; once its approval has been given, the necessary annotations shall be made in the relevant files.

489. Notice of any change in the membership of the managing committee of a trade union shall be given to the Ministry of Labour and Social Welfare through the General Directorate of Labour; the notice shall contain the particulars indicated in clause (7) of section 481. No change shall be effective unless this requirement has been observed.

490. No trade union may operate as such, may carry out any of the functions prescribed by law or in its by-laws or may exercise any of its rights until its legal personality has been recognised, and then only for such time as the recognition remains valid.

Chapter V. Powers and Duties of Trade Unions

491. The chief functions of a trade union shall be—

(1) to study the characteristics of the occupation concerned, including the wages, allowances, hours of work, arrange-

ments for the protection of workers and the prevention of accidents, and other conditions of work of importance to its members, so as to improve their circumstances and defend their interests;

(2) to encourage employers and workers to co-operate on the basis of justice, mutual respect and regard for the law, and to assist in improving the methods peculiar to the occupation concerned and in developing the economy in general;

(3) to conclude collective agreements and contracts of employment, to ensure that they are performed by members and to exercise such rights and take such proceedings as may arise out of the said agreements and contracts;

(4) to advise its members in defending their rights under their contracts of employment or in their work and to represent them before the administrative authorities, their employers and third parties;

(5) to represent the general or collective interests of its members or of the occupation concerned before the courts or any other authorities or bodies and to represent such interests before employers or third parties when collective disputes arise which cannot be settled by direct negotiation, and to endeavour to conciliate the parties;

(6) to promote the technical and general education of its members;

(7) to assist its members in the event of unemployment, sickness, invalidity or hardship;

(8) to promote the creation and development of co-operatives, savings funds, loan and mutual benefit societies, schools, libraries, technical and vocational training institutions, placement offices, hospitals, experimental stations, sports grounds and other facilities serving the occupational, cultural, mutual assistance and welfare purposes laid down in the by-laws;

(9) to act as intermediary in the purchase and distribution to members of consumer goods, raw materials and equipment at cost price;

(10) to acquire by any legal title such real and movable property as it requires to carry on its activities;

(11) to be represented on governmental bodies, in cases where trade union participation is provided for by law;

(12) to notify the competent labour officials of any irregularities observed in the application of this Code and the regulations made thereunder; and

(13) to answer any inquiries made by the competent labour officials and to assist such officials in all cases prescribed by law or regulations.

Other Duties

492. A trade union shall also have power

(1) to designate members to sit on permanent or temporary grievance committees or to act as trade union delegates on disciplinary tribunals;

(2) to submit claims in connection with working conditions or disputes between workers and employers, irrespective of their origin, but only if they are not legally or contractually subject to some other procedure or cannot be dealt with by any other means;

(3) to assist in the legal examination of claims, to appoint and empower members as negotiators, and to nominate conciliators and arbitrators when the need arises;

(4) to call strikes in accordance with the law; and

(5) to undertake any other duties which are not inconsistent with its essential purposes or with the law.

Right to Be Received by the Authorities and by Employers

493. Where the duties prescribed in the two preceding sections have to be discharged in relation to any authority or employer, such authority or employer shall be obliged to receive the trade union's representatives, deputies or spokesmen.

Exclusive Powers of the General Meeting

494. The general meeting shall have sole power

(1) to elect the members of the managing committee, who shall hold office for the period laid down in the by-laws and shall be eligible for re-election;

(2) to replace any officer who is absent and to remove either permanently or temporarily any member of the managing committee, in accordance with the by-laws;

(3) to approve the by-laws and any amendments thereto;

(4) to give final approval to collective labour agreements, conciliation settlements, agreements to submit to arbitration and any other arrangements that are generally binding on the members of the trade union.

The managing committee may enter into such agreements, settlements and arrangements, subject to a consultation of all the members of the union, and may also give its final approval to them if the general meeting has expressly authorised it to do so in each particular case;

(5) to call strikes or stoppages in accordance with the law;

(6) to adopt the annual budget on the basis of estimates submitted by the managing committee, to approve or reject the annual accounts presented by the managing committee and to order any necessary action to be taken thereon;

(7) to fix the amount of the guarantee required of the treasurer;

(8) to fix the limits of the investments that may be made by the managing committee without prior authorisation;

(9) to fix the amount of the ordinary and special contributions and the amount of the wages to be paid;

(10) to decide on the expulsion of members;

(11) to decide on amalgamation with any other union or unions and on affiliation with, or withdrawal from, a federation or confederation;

(12) to decide on the dissolution and liquidation of the union;

(13) to approve any claims to be submitted to employers within the next two months;

(14) to appoint negotiators and to elect conciliators and arbitrators; and

(15) to discharge such other powers as may be conferred on it by law or in the by-laws or as are in keeping with its status as the highest authority of the organisation.

495. Resolutions of the general meeting shall be adopted by a simple majority vote: Provided that a two-thirds majority vote of the members present shall be required for the adoption of resolutions under clauses (3), (9) and (10) of the preceding section, a majority vote of two-thirds of the total number of members of the union for the adoption of resolutions under clauses (11) and (12), and a majority vote of two-thirds of the total number of members of the union or the branch concerned for the adoption of resolutions under clause (5).

496. For the decisions of the general meeting of a trade union to be valid, the following rules must be observed:

(a) the meeting must have been convened in the manner and subject to the conditions laid down in the by-laws;

(b) each decision must have been adopted by a majority vote, in accordance with section 495; and

(c) minutes must be kept of each meeting; such minutes must be signed by the chairman of the meeting and the secretary, record the number of members present and contain a summary of the discussions and the full text of any decisions adopted.

497. Compliance with the rules contained in the three preceding sections and with any other provisions contained in any law or by-law requiring a special procedure or a specified majority

shall be proved by a copy of the relevant part of the minutes of the meeting in question.'

Chapter VI. Freedom to Work: Prohibited Acts and Penalties

Freedom to Work

498. No trade union shall restrict the freedom to work, either directly or indirectly.

Prohibited Acts

499. It shall not be lawful for a trade union

(a) to participate in party politics or religious affairs by being represented at political congresses, on political committees, or at religious gatherings or meetings, by making financial contributions to political parties or religious groups or by officially sponsoring candidates for public elections: Provided that the foregoing shall be without prejudice to the political rights and the freedom of conscience, worship, assembly and speech of the individual members of the union;

(b) to compel any worker, either directly or indirectly, to join or withdraw from the union, save in cases of expulsion on grounds provided for in the by-laws and duly proved;

(c) to use the funds or property of the union for any purposes other than those for which the union was formed or, even for such purposes, to make payments or investments that have not been expressly authorised in the manner prescribed by law or in the by-laws;

(d) to perform commercial transactions of any kind, whether with workers or with third parties;

(e) to encourage any cessation or suspension of work, save in the case of strikes called in accordance with the law;

(f) to promote or support any campaign or movement implying a collective and active disregard, particularly by members of the union, for the law or for the decisions of the lawfully constituted authorities;

(g) to promote or encourage an active disregard for the agreements or contracts to which its members are a party, without advancing any grounds or reasons for so doing;

(h) to order, recommend or encourage any acts of violence against the authorities or to the detriment of employers or third parties;

(i) to furnish the labour authorities with incorrect information with an intent to deceive;

(j) to accord special privileges to its founders, officers or advisers, whether on grounds of age, sex, seniority or any other circumstance, except those which are inherent in the proper discharge of their trade union duties; and

(k) to distribute dividends or profits to members, allow periodic liquidations for the purpose of distributing the union's assets or make loans from its funds, except through co-operatives or special funds established for the purpose.

Penalties

500. Any breach of the rules contained in this Part shall be punishable as follows:

(1) where the breach is attributable to the union itself, owing to its being due to a decision of the managing committee, and the contravention or action out of which it arises has not yet been committed, the Ministry of Labour and Social Welfare shall warn the union to reverse its decision within a time limit to be fixed at the Ministry's discretion;

(2) if the contravention has already been committed or the warning issued is not heeded, the Ministry of Labour and Social Welfare shall, on adequate proof being shown, impose the following penalty or penalties:

(a) a fine not exceeding 500 lempiras for the first offence;

(b) if the union continues the breach in spite of the fine, the members of the managing committee may be suspended from the performance of their trade union duties for such time as the breach continues;

(c) if the breach continues and no other penalty has been effective, the legal personality of the union may be suspended for such time as the breach continues; and

(d) as a last resort, application may be made to the labour court to cancel the union's legal personality and to dissolve and liquidate the union itself;

(3) application to cancel a union's legal personality and to dissolve and liquidate the union itself shall be made to the labour judge for the place where the union has its registered address or, in the absence of such judge, to the civil judge, in accordance with the provisions of this Code;

(4) the penalty of suspension mentioned in clauses *(b)* and *(c)* above shall be discontinued as soon as the contravention which gave rise to it has ceased;

(5) every member of a managing committee which has involved the union concerned in the penalty of dissolution may be deprived of his right of association in any form for a period

of up to three years if the judge so decides in the ruling ordering the dissolution, which shall indicate the persons responsible by name.

Penalties to Which Officers Are Liable

501. Where the act or omission constituting the offence is attributable to one of the officers or members of a union acting in his capacity as such, the administrative labour official shall, after verifying the facts, call upon the union to impose the disciplinary penalties prescribed in the by-laws on the person or persons responsible. If the appropriate penalties have not been imposed on the expiry of the allotted time, which shall not exceed one month, the breach shall, for the purposes of the preceding section, be deemed to be directly attributable to the union itself.

Chapter VII. Internal Organisation

Name

502. No trade union shall adopt a name which might be misconstrued or lead to confusion with another existing union, or use a designation peculiar to any political party or religion, or call itself a federation or confederation. Every employers' association shall indicate that it is an association of employers in its name.

Minimum Age

503. Any worker who is over 14 years of age may join a trade union, but no person who has not yet come of age may be a member of a managing committee.

Nationality

504. No trade union may operate unless Honduran citizens represent at least 90 per cent. of its membership. Whatever form the management of a union may take, no alien shall be eligible to become an officer.

General Meeting

505. A general meeting shall be held at the intervals and in the manner laid down in the by-laws.

Quorum at General Meetings

506. No general meeting shall be validly held unless there is the quorum laid down in the by-laws, which shall not be less than

half the members of the union, plus one; only the votes of the members present shall be counted.

If the absence of a quorum prevents the holding of a valid meeting, the managing committee shall convene another meeting for the same purpose and this meeting shall be validly held irrespective of the number of members present.

Representation of Members at the General Meeting

507. If, owing to the nature of the activities or occupations, geographical distribution or numerical strength of its members, a union cannot apply the provisions of the preceding section, the by-laws may provide for some other method whereby members can be represented at the general meeting.

Managing Committee

508. The managing committee shall be responsible for managing the affairs of the union and shall be responsible to the members of the union and to third parties in the same way as agents under the Civil Code. The members of the managing committee shall be jointly responsible, save where they have had their dissenting votes recorded in the minutes of the meeting.

The union shall be legally represented by the chairman of the managing committee or, in his absence, by the general secretary.

509. Any civil obligations contracted by the officers of a union within the limits of their mandate shall be binding on the union itself.

Qualifications Required of Members of the Managing Committee

510. Every member of the managing committee and provisional managing committee of a union shall fulfil the following conditions, which shall be in addition to any conditions laid down in the by-laws:

(a) he must be an Honduran citizen;

(b) he must be a member of the union;

(c) at the time of his election he must be regularly employed (i.e. otherwise than on a casual basis, on probation or as an apprentice) in an activity, occupation or trade covered by the union and have been so employed for more than six months during the previous year;

(d) he must be able to read and write;

(e) he must be in possession of his citizenship papers or an identity card, as the case may be; and.

(f) he must not have been sentenced to imprisonment (or if so, he must have been subsequently cleared of the charge) or be facing trial for a non-political offence at the time of his election.

Failure to fulfil any one of the above conditions shall invalidate the election of the person concerned: Provided that any breaks in the normal course of the activity, occupation or trade, as referred to in clause *(c)*, shall not invalidate the election if they were occasioned by the discharge of trade union duties.

Managerial Employees

511. Members of a union who, by reason of their duties in the undertaking, represent the employer or hold managerial posts or positions of trust or may easily exercise an undue influence over their fellow-workers shall not be eligible to serve on the managing committee of a works or basic union or to be appointed as officers of such a union. In this category shall be included managers, assistant managers, administrators, chiefs of personnel, private secretaries to the board of directors, the management or the administration, departmental chiefs (such as chief engineers, chief medical officers, legal consultants and technical managers) and other similar employees. The election of any such member shall be null and void, and any person who, after being duly elected, is subsequently appointed to any of the aforementioned posts shall automatically vacate his trade union office.

512. Members of the managing committee of a union shall not serve for less than six months, except in the case of the provisional managing committee, whose term of office shall not extend beyond 30 days, reckoned from the date on which the recognition of the union's legal personality was officially published: Provided that the same persons may be elected for the prescribed period. The foregoing shall not restrict the freedom of the union to remove any member of the managing committee in the cases laid down in the by-laws, nor shall it prevent any member from resigning; in such event the deputy member shall take office for the remainder of the period.

If the provisional managing committee fails to convene a general meeting to elect the first regular committee within the 30 days referred to in this section, a meeting may be convened by not less than 15 members.

513. The election of the managing committee of a union shall be conducted in the manner prescribed by the general meeting, votes being taken by a simple majority.

514. At general meetings and meetings of the managing committee, any member may request that the names of those present when a decision is taken should be recorded in the minutes.

515. The managing committee shall —

(a) apply the provisions of the relevant laws and by-laws and execute all decisions of the general meeting;

(b) lay down the necessary rules for the running of the organisation, in accordance with the by-laws, and take the necessary decisions to ensure that they are strictly carried out;

(c) submit a full report of its activities to the general meeting, together with a detailed account of the administration of the union's funds;

(d) set up permanent committees;

(e) ensure that all members abide by the by-laws and carry out their obligations.

516. It shall not be lawful to dismiss from his employment any worker who is a member of the managing committee of a union, at any time from the date of his election until the end of the six months after he ceases to hold office, unless evidence is first submitted to the competent labour or civil judge showing that there is lawful cause for terminating his contract of employment. The judge shall decide the matter in accordance with summary procedure. Where a union is divided into branches and sub-branches, this rule shall apply only to the central managing committee.

Any employer contravening the preceding paragraph shall be liable to pay the union concerned the equivalent of the worker's wages for six months by way of damages, without prejudice to the rights of the worker himself.

517. If 30 workers formally notify their employer in writing of their intention to form a trade union, and transmit such notification to the General Directorate of Labour or to the labour attorney's section for the area, the persons signing the notification shall enjoy the special protection of the State. From the date of the notification until the date on which the union's legal personality is recognised, none of the workers concerned may accordingly be dismissed, transferred or prejudiced in his conditions of work without lawful cause, which must first be confirmed by the competent authority.

518. It shall be the duty of every trade union —

(1) to submit such reports as are requested by the labour authorities: Provided that such reports shall be exclusively concerned with its trade union activities;

(2) to notify the General Directorate of Labour of any changes made in the managing committee within a fortnight of the election;

(3) to furnish the General Directorate each year with a complete list of all new members and withdrawals;

(4) to take the necessary steps to have amendments to the by-laws legally approved, in accordance with section 487, within a fortnight of the general meeting at which the amendments were adopted.

Records

519. As soon as the articles of association have been signed and the members of the provisional managing committee appointed, every trade union shall maintain at least the following records: a register of members, minutes of the general meeting, minutes of the managing committee, inventories and balance-sheets, and income and expenditure accounts. The books used for such records shall first be approved by the General Directorate of Labour, which shall stamp, number and initial each page.

It shall not be lawful to tear out, substitute or add pages, make alterations, write between the lines or erase or strike out any entry in any book which a trade union is obliged to keep; any omission or mistake shall be corrected by means of an appropriate annotation. Failure to observe these rules shall render the offender liable to a fine of between 2 to 50 lempiras, which shall be imposed by the labour inspector in favour of the union; half the aforementioned penalty, also in favour of the union, shall be imposed on every trade union officer or employee who, although aware of the contravention, failed to impose the appropriate union penalty or report it to the labour inspector.

Budget

520. At its general meeting a trade union shall vote a budget of expenditure for a period not exceeding one year; no outpayments that are not provided for in the budget may be made without the express permission of the general meeting. Without prejudice to any further limits or conditions laid down in the by-laws, any outpayment of more than 50 lempiras (other than wages for which sums have been appropriated in the budget) shall require the prior approval of the managing committee; any outpayments of more than 200 but not more than 1,000 lempiras, even if envisaged in the budget, shall require the approval of the general meeting by a two-thirds majority vote of the members. The foregoing rules shall not apply to expenditure incurred through strikes that are called by the union, whatever the amount may be.

Treasurer's Guarantee

521. The treasurer of every trade union shall deposit a guarantee with the union as security for the proper management of its funds. The amount and form of the guarantee shall be

decided by the general meeting and a copy of the document recording the decision shall be filed with the General Directorate of Labour.

Deposit of the Funds

522. The funds of every trade union shall be deposited with a bank or savings fund, except for such amount not exceeding 50 lempiras as is authorised by the by-laws for use as petty cash. Any draft or money order shall be authorised by the joint signatures of the chairman, treasurer and comptroller.

The banking institution with which the union has deposited its funds shall have full power to inform any labour authority of the position of the union's account if an official request to that effect is made.

Accounts

523. The accounts of a trade union shall be kept in accordance with the provisions of the Commercial Code and with any special rules contained in the by-laws or decided by the managing committee.

Expulsion of Members

524. A trade union shall have power to expel any member or members: Provided that the expulsion shall be ordered by the majority specified in section 495.

Withdrawal of Members

525. A trade union shall order the withdrawal of any member who voluntarily ceases for the period of one year to engage in the occupation or trade which it is the purpose of the union to defend and improve.

Deduction of Union Contributions

526. Every workers' trade union shall be entitled, if so decided by a majority vote of its members, to request the various employers concerned to deduct the value of its members' ordinary and extraordinary contributions from the wages earned by those of its members whom they employ and to pay the amount so deducted to the union: Provided that the deduction of extraordinary contributions shall be authorised by the workers themselves in writing. If a worker ceases at any time to be liable for contributions, owing to his withdrawal or expulsion from the union, he shall notify the employer in writing and, on receipt of such notification, the employer shall cease to make the deductions, even though he has not received instructions from the union.

The foregoing shall be without prejudice to the union's rights in the event of incorrect information being given by the worker.

As authorisation for the deduction of ordinary contributions, the trade union shall furnish the undertaking with the following documents:

(a) a copy of the relevant passage in the minutes of the general meeting at which the deduction was authorised by a majority vote of all the members; such copy shall be accompanied by a list of the members present at the meeting;

(b) a list, in duplicate, duly certified by the chairman, secretary and comptroller of the union, of all the members in good standing at the time of the authorisation whose contributions are to be deducted, even where they voted against the authorisation or have expressed a wish not to have their contributions deducted;

(c) in the case of later entrants, their enrolment forms, duly certified in the manner indicated in clause *(b)*.

Chapter VIII. Dissolution and Liquidation

Dissolution

527. A trade union, federation or confederation may be dissolved only—

(a) if one of the events mentioned in the by-laws as entailing its dissolution occurs;

(b) if a resolution to that effect is adopted at a general meeting by at least two-thirds of the members of the organisation, and the resolution is signed by all those present;

(c) if a court of law so orders;

(d) if the membership falls below 30 in the case of a workers' union.

528. In the event of dissolution the Ministry of Labour and Social Welfare shall cancel the registration of the union by making a marginal note in its records and shall arrange for an extract of the court order, administrative decision or resolution of the general meeting to be published in three consecutive issues of *La Gaceta*.

529. Any activity undertaken and any contract concluded or performed by a union after its dissolution shall be *ipso facto* null and void, save in so far as it relates exclusively to the liquidation of the union.

Even after its dissolution a trade union shall be deemed to exist for all purposes relating exclusively to its liquidation.

Liquidation

530. In the event of dissolution the Ministry of Labour and Social Welfare shall appoint a liquidation committee consisting of a labour inspector, who shall act as chairman, and two persons of good repute, to be selected from among the workers or employers, as the case may be.

The liquidation committee shall act as the representative of the union that has been dissolved and in discharging its duties shall observe the procedure laid down in the by-laws, which may empower the Ministry of Labour and Social Welfare to issue such instructions as it considers appropriate or to direct that the ordinary law is to be applied as far as possible.

531. Where a trade union, federation or confederation is dissolved, the liquidation committee shall, in the first instance, use all existing funds, all money accruing from the sale of property and all sums obtained from the recovery of outstanding debts to pay the creditors of the union, federation or confederation (including liquidation costs). The residue shall be used to reimburse the ordinary contributions paid by active members, less any debts owed by such members to the union, federation or confederation. If the residue is insufficient for this purpose, it shall be distributed to active members in proportion to their contributions. In no circumstances and on no account shall any member receive more than the value of his ordinary contributions.

In the event of the dissolution of a union which has been affiliated to a federation or confederation, the liquidation committee shall permit a representative of the federation or confederation to participate in its work in a purely advisory capacity.

Disposal of Residual Assets

532. Any assets remaining after creditors have been paid and the above reimbursements have been effected shall be made over by the liquidation committe to the trade union organisation designated for the purpose in the by-laws or by the general meeting; if no such organisation has been designated, the assets shall be made over to a benevolent or social welfare institution designated by the Government.

Official Approval

533. The liquidation of a union shall require the approval of the Ministry of Labour and Social Welfare, which shall in due course certify that the liquidation committee has fully discharged its obligations.

Chapter IX. Persons Employed by the State

Right of Association

534. The right of association shall be enjoyed by all persons employed by the State, with the exception of members of the armed forces and the various types of police forces: Provided that a trade union of civil servants shall have no other functions than—

(1) to study the characteristics of the occupation concerned and the working conditions of its members;

(2) to advise its members in defending their rights as civil servants, and particularly the rights pertaining to administrative careers;

(3) to represent the general or collective economic interests of its members or of the occupation concerned before the courts or any other authorities;

(4) to submit respectful memoranda to the appropriate administrative heads, containing petitions on matters of interest to all its members, complaints relating to the treatment accorded to particular individuals or suggestions for improving the administrative organisation or methods of work;

(5) to promote the technical and general education of its members;

(6) to assist its members in the event of unemployment, sickness, invalidity or hardship;

(7) to promote the creation, development or subsidising of co-operatives, savings funds, loan and mutual benefit societies, schools, libraries, technical and vocational training institutions, placement offices, hospitals, experimental stations, sports grounds and other facilities serving the occupational, cultural, mutual assistance and welfare purposes laid down in the by-laws; and

(8) to acquire by any legal title such real and movable property as it requires to carry on its activities.

Right to Be Received by the Authorities

535. The duties prescribed in clauses (3) and (4) of the preceding section shall entail an obligation on the authorities, and especially on the direct superiors of the members concerned, to receive the trade union's representatives and to find an adequate solution to their problems.

Limitation of Powers

536. No trade union of civil servants may submit claims or conclude collective agreements, but the trade unions of other

persons employed by the State shall have all the powers of other workers' unions, and their claims shall be examined in the same way, even though they are not permitted to call or conduct a strike.

Chapter X. Federations and Confederations

Right to Federate

537. All trade unions shall enjoy an unrestricted right to unite or join together in local, regional or national federations, whether occupational or industrial, and such federations may unite or join together in confederations. Federations and confederations shall be entitled to have their own legal personality and shall exercise the same powers as trade unions, except that they shall have no power to call a strike, which shall be vested solely, and in so far as is permitted by law, in the unions or groups of workers directly or indirectly concerned.

Two or more workers' unions or three or more employers' associations may form a federation and two or more workers' or employers' federations may form a confederation.

Additional Duties

538. The by-laws of a federation or confederation may provide for it to act as an appeals tribunal in connection with disciplinary measures imposed by any of the affiliated organisations, for it to settle disputes arising between the members of an affiliated union as a result of the union's decisions and for it to resolve differences between two or more affiliated organisations.

Authorisation of Founders

539. When a federation or confederation is established, the representatives of the unions signing the articles must be expressly empowered to do so by their respective general meetings.

Articles of Association

540. The articles of association shall indicate the name and registered address of each affiliated organisation, the number and date of the decision recognising its legal personality, the number and the date of the official gazette in which the decision was published, its registration number, the names and particulars of the identity cards of all members of the provisional managing committee and, where appropriate, the undertaking or undertakings in which they are employed.

Managing Committee

541. Every member of the managing committee and provisional managing committee of a federation or confederation shall fulfil the following conditions, which shall be in addition to any conditions laid down in the by-laws:

(a) he must be a Honduran citizen in full possession of his civil and political rights;

(b) he must be a full member of one of the affiliated organisations;

(c) at the time of his election he must be regularly employed in an activity, occupation or trade covered by his union and have been so employed for more than a year;

(d) he must be able to read and write;

(e) he must be in possession of his citizenship papers or an identity card, as the case may be; and

(f) he must not have been sentenced to imprisonment (or if so, he must have been subsequently cleared of the charge) or be facing trial for a non-political offence at the time of his election.

Failure to fulfil any one of the above conditions shall cause the provisions of the last paragraph of section 510 to be applied.

The conditions laid down in clauses *(b)* and *(c)* above shall be disregarded in cases where a person resigns from a union, ceases to engage in his occupation, relinquishes his contract of employment in a particular undertaking or changes his trade on account of trade union duties or activities. The facts shall be stated by the general meeting at which he is elected. Any lawful suspension of his contract of employment shall be similarly disregarded.

Legal Personality

542. The procedure for the recognition of legal personality in the case of a federation or confederation shall be the same as in the case of a trade union, in so far as it is relevant.

Provisional Managing Committee

543. The provisional managing committee of a federation or confederation shall hold office until the first general meeting after the recognition of the federation's or confederation's legal personality.

By-laws

544. The by-laws of a federation or confederation shall be approved by the Ministry of Labour and Social Welfare and shall make provision for the term of office of the managing or executive committee, the manner of its election, its composition, the quorum at ordinary general meetings and the intervals at which such

meetings must be held, the period to be covered by the budget and the conditions subject to which expenses may be validly incurred.

Advice by Federations and Confederations

545. Any federation or confederation may advise its affiliated organisations in their dealings with employers in connection with disputes, or with the authorities or third parties in connection with representations of any kind.

Withdrawal

546. A trade union may withdraw at any time from the federation or confederation to which it is affiliated if a decision to that effect is voted by the majority required by section 495. Any provision in the by-laws to the contrary shall be null and void.

Chapter XI. Concluding Provisions

547. Every trade union organisation shall furnish the Ministry of Labour and Social Welfare with a detailed statement of income and expenditure each year and shall submit to inspection and supervision by the Ministry to ensure that it has discharged its obligations under the by-laws in such matters: Provided that if a claim is submitted and the Ministry is notified by the transmission of a copy of the claim through the appropriate labour inspector, such financial supervision shall be suspended until the end of the dispute, at which time the inspector shall be given a detailed account of the employment of the funds during the dispute.

548. Five or more members of a union may at any time demand that the accounts of their union should be inspected by an auditor from the General Audit Office of the Republic; such inspection shall in any event be carried out automatically by the General Audit Office at least once a year.

549. The Ministry of Labour and Social Welfare shall encourage the peaceful and orderly development of the trade union movement by such legal methods as it deems desirable. To this end it shall, by executive decree, take all necessary measures to guarantee that the right of association is effectively enjoyed.

Part VII. Collective Labour Disputes

Chapter I. General Provisions

Definition of Strikes

550. The expression " strike " means a collective, temporary and peaceful stoppage of work called by the workers employed in

an establishment or undertaking in order to secure the acceptance of financial and occupational claims which they have submitted to their employers, after complying with the procedure laid down in this Part.

The ordinary courts shall impose the penalties provided for by law on persons committing any acts of coercion or violence against persons or property in connection with a strike.

Purpose of Strikes

551. The purpose of a strike shall be

(1) to achieve a balance between the various factors of production by bringing the rights of labour into line with those of capital;

(2) to prevail on the employer to conclude or implement a contract of employment or a collective labour agreement; and

(3) in appropriate cases, to secure a revision of a contract of employment or collective labour agreement on its expiry, in the circumstances and cases prescribed in this Code.

Legal Effects of Strikes

552. A lawful strike shall suspend the contracts of employment and collective labour agreements in force in the undertaking, place or business in which it is called, for the whole duration of the strike, without involving any termination or expiry of the rights and obligations deriving from such contracts or agreements. No employer shall make new contracts of employment during a strike, save in departments where, in the opinion of the authority dealing with the strike, it is essential that work should continue in order to avoid serious danger to the safety and preservation of the workshops, premises, equipment, machinery or essential facilities, and then only if the strikers do not allow the personnel required in such departments to remain at work.

553. To call a strike it is necessary—

(a) that its sole purpose should be one or more of those listed in section 551 of this Code;

(b) that the possibilities afforded for the direct settlement of disputes and for mediation, conciliation and arbitration should have been exhausted;

(c) that the decision to call it should be taken by at least two-thirds of the persons working in the undertaking, place or business in question; and

(d) that the other conditions prescribed in this Code have been fulfilled.

Public Services

554. Any organised activity to meet the needs of the general public on a regular and permanent basis under special legislation shall be deemed to constitute a public service, whether it be undertaken by the State (directly or indirectly) or by private persons.

The following activities, *inter alia*, therefore constitute a public service:

(1) those of any branch of government;

(2) those of land, water and air transport undertakings, and of water supply, electric power and telecommunication undertakings;

(3) those of medical establishments of all kinds, such as hospitals and clinics;

(4) those of social assistance, charitable and benevolent institutions;

(5) those connected with the production and supply of essential foods (on condition that an entire branch is affected);

(6) those of all health and sanitation services in towns and villages;

(7) those connected with the extraction, refining, transport and distribution of petroleum and its derivatives if, in the opinion of the Government, they are intended to supply the country's normal fuel needs;

(8) any other activities that in the opinion of the Government affect the safety, health, education and economic or social life of the people, at times when the individual guarantees to which section 163 of the Constitution of the Republic relates have been restricted.

Decisions under this clause shall be taken by the President of the Republic by means of an order in council; and

(9) those connected with scientific research into diseases and with operations to protect animal and plant life.

Restrictions on the Right to Strike in Public Services

555. In the public services referred to in the preceding section the exercise of the right to strike shall be subject to the following restrictions.

In cases covered by clauses (1), (7) and (8) disputes between employers and workers shall be submitted by either of the parties to the Ministry of Labour and Social Welfare for examination and determination before a strike is called.

It shall not be lawful to call a strike in services covered by clause (2) if the workers in a transport undertaking have not completed their journey.

It shall not be lawful to call a strike in undertakings covered by clauses (3), (4), (5) and (6) or in water supply, electric power or telecommunication undertakings unless the workers make available the necessary personnel to ensure that a suspension of the services provided does not result in serious and immediate danger to public health or safety or to the economy in general.

It shall likewise not be lawful to call a strike in wartime if the workers belong to any public service.

556. In any case where the operation of the services mentioned in the preceding section is in fact suspended, the Executive shall have power to take over the management and administration of such services for such time as is necessary to avoid any harm to the community, and shall take all necessary measures to restore such services and guarantee their continuance, after issuing a special decree giving the reasons for the measures taken.

557. Workers employed by the State, by state institutions or by municipalities shall be entitled to exercise the right to strike without regard to the restrictions laid down in section 555 in either of the following cases:

(a) if an attempt is made to infringe in any way the principle that the President of the Republic shall not hold office for two consecutive terms; or

(b) if an attempt is made to overthrow the legally constituted Government.

Public Service Undertakings

558. No public service undertaking that is not operated directly or indirectly by the State shall suspend or stop work unless it obtains the permission of the Government or gives at least six months' notice to the Government, so that measures can be taken in good time to ensure the continuance of the services provided.

559. No undertaking that does not provide a public service shall suspend operations without giving its workers at least one month's notice, save in cases of *force majeure* or a fortuitous event, and without prejudice to any compensation payable in respect of contracts of employment concluded for a longer period. If the undertaking resumes operations within 120 days, it shall give preference in re-engaging workers to those whom it discharged, on terms not less favourable than those on which they were employed when the undertaking closed. Workers who have been duly notified and who fail to report for work within three days shall lose this preferential right.

560. If a labour court rules that the reasons for a lawful strike are attributable to the employer, through his failure to per-

form any labour contract or contracts, through his unjustifiable refusal to conclude a contract or collective agreement, or through his ill treatment of his workers or his violent behaviour towards them, the court shall sentence him to pay the wages due for the days on which the workers are on strike.

Any workers who remain at work to prevent the suspension of the service from affecting public health or safety or the economy in general shall be entitled to double pay.

561. An unlawful strike shall terminate the contracts of employment of the strikers without liability for the employer, and the strikers shall pay the employer such compensation for damages as the labour court may fix at its discretion. The foregoing shall be without prejudice to any penalties that may be imposed on the strikers by the ordinary courts for offences or misdemeanours committed during the strike.

Any new contracts concluded by the employer shall not, however, provide for less favourable terms than those which applied in each particular case before the unlawful strike was called.

Chapter II. Calling and Conduct of Strikes

562. The following conditions shall be fulfilled before a strike is called:

(1) The workers shall present the employer with a written statement of their claims, announcing their intention of going on strike, specifying the object of the strike and citing the clause of section 551 by which it would be covered. Such notice shall be given at least six days before the date mentioned for the suspension of work: Provided that the period shall not be less than ten days in the case of public services. Such period shall run from the moment when the employer has been notified.

The giving of notice shall also have the effect of placing the employer, for the duration of the period of notice, in the position of a trustee or administrator, as the case may be, of the centre of employment, undertaking or business that will be affected by the strike, with all the duties and responsibilities attaching to such functions.

(2) The written statement of claims referred to in the preceding subsection shall be submitted to the conciliation and arbitration board, together with one additional copy which the chairman of the board shall be personally responsible for transmitting to the employer on the same day as he receives it. The employer or his representative shall reply in writing to the workers' claims within the next 48 hours, also through the conciliation and arbitration board.

Where the centre of employment, undertaking or business is not located at the place where the board has its seat, the workers may deliver their statement of claims to the nearest labour authority or, where there is no such authority, to the highest local political authority. In either case the authority receiving the statement of claims shall be personally responsible for transmitting it to the employer on the same day; after showing the reply to the workers as soon as it is received, or if the employer does not reply within 48 hours, the authority shall transmit the file as rapidly as possible to the conciliation and arbitration board.

563. The decision to call a strike must be approved in a secret ballot by two-thirds of the workers employed in the undertaking or establishment concerned or by two-thirds of the general meeting of the works or basic union to which over half such workers belong.

564. Once a strike has been called, the workers shall leave the workplace.

565. If a trade union or a group of non-unionised workers calls a strike after exhausting the preliminary procedure for a direct settlement and for mediation, conciliation and arbitration, the strike shall be conducted in an orderly and peaceful manner.

566. The leaders of the strike shall be authorised to set up strike committees to keep the workers informed and to establish contact with employers or their representatives.

567. Where a strike lasts for more than eight days, the Ministry of Labour and Social Welfare shall arrange for the establishment of a tribunal of three members, one appointed by the employers, one by the workers and one by the Ministry, to inquire into the dispute and to propose a settlement to the parties; the adoption or rejection of such a proposal by the workers shall be determined by a ballot, as prescribed in section 563. The same procedure shall be repeated at intervals of eight days. If the parties are slow or reluctant to appoint their members of the tribunals referred to in this section or to provide a substitute when a member is absent, the Ministry shall make the necessary appointments in their behalf.

568. The strikers, acting through their representatives, shall be required to provide, and the employers or their representatives to accept, a number of workers sufficient in the opinion of the appropriate labour inspector to ensure the continuation of any work whose suspension would seriously hinder the resumption of operations or be seriously detrimental to the safety and maintenance of the workshops or business premises. Where necessary, the

General Directorate of Labour may request the assistance of the police to ensure that other workers do such work if the strikers refuse.

Chapter III. Unlawful Collective Stoppages of Work

Cases in Which a Stoppage is Unlawful; Penalties

569. A collective stoppage of work shall be unlawful in any of the following cases:

(1) in the case of a public service, for such time as the conditions laid down in section 555 have not been fulfilled;

(2) when the purpose of the stoppage is not occupational or economic;

(3) when the preliminary procedure for a direct settlement or for mediation, conciliation and arbitration has not been followed as laid down by law;

(4) when the stoppage is held in contravention of the provisions of section 563;

(5) when it is held after more than two months have elapsed since the end of the conciliation proceedings;

(6) when it is not confined to a peaceful suspension of work; and

(7) when it is held with the object of forcing the authorities to take some action falling within their exclusive competence.

Declaration That a Stoppage Is Unlawful

570. The fact that a collective stoppage of work is unlawful shall be declared through administrative channels by the Ministry of Labour and Social Welfare. The order embodying such a decision shall be immediately applicable and may be impugned only by proceedings instituted before the labour courts.

A resumption of work shall not prevent the Ministry from declaring a stoppage to be unlawful.

In any ruling given on collective stoppages of work in the light of the reasons mentioned in subsections (3) and (4) of section 569, no account shall be taken of any procedural irregularities.

571. Once a stoppage of work has been declared to be unlawful, the employer shall be free to avail himself of this reason in discharging any persons who were associated with or participated in the stoppage. A statement to that effect shall be included in the order declaring the stoppage to be unlawful, and any union that furthered or supported the suspension or stoppage shall have its legal personality suspended for a period of between two and six months and may even be ordered to be dissolved if the authority or official issuing the declaration so decides.

The penalties mentioned in this section shall not prevent the employer from bringing an action for damages against those responsible.

Chapter IV. Termination of Strikes

572. A strike shall be terminated—

(1) by agreement between the employers and workers concerned;
(2) by an arbitration award made by any person, committee or tribunal freely chosen by the parties; and
(3) by an award of the appropriate conciliation and arbitration board.

573. For such time as a strike is not brought to an end by any of the means mentioned in the preceding section neither the employer nor his representatives shall conclude new contracts with the strikers or with any other workers, whether individually or collectively, for the performance of the work to which the stoppage relates, save in the special cases laid down in this Code.

Chapter V. Lawful and Unlawful Lockouts

574. The expression "lawful lockout" means a temporary and peaceful stoppage of work, whether partial or total, ordered by one or more employers with the sole object of defending their economic and social interests.

In the case of a body corporate a lockout shall be ordered by the board of directors or the managing partners.

575. A lockout shall be lawful if the employers comply with the provisions of sections 553 *(b)* and 574 and then give all their workers one month's notice of the lockout, for the sole purpose of enabling such workers to terminate their contracts of employment during the period of notice without liability for either party.

Such notice shall be given when the conciliation proceedings are concluded.

576. Throughout a lawful lockout the contract or contracts of any workers who have not availed themselves of the opportunity afforded under the preceding section shall be deemed to be suspended. In no case may such workers claim the payment of any wages and allowances corresponding to the period of the stoppage.

577. The resumption of work shall be governed by the rules laid down in section 103.

578. The provisions of sections 550 (second paragraph), 554, 555 and 556 shall apply to lockouts.

579. Any act of malice on the part of the employer that prevents the workers from engaging in their normal work shall be deemed to constitute an unlawful lockout.

580. Every unlawful lockout shall have the following effects:

(1) It shall entitle the workers to claim their immediate return to work or to terminate their contracts of employment with any appropriate statutory benefits and compensation.

(2) It shall oblige the employer to resume work immediately and to pay the workers any wages which they would otherwise have received while their work was improperly suspended.

(3) It shall render the offender liable in each case to a fine of between 50 and 1,000 lempiras, according to the gravity of the offence and the number of workers affected, without prejudice to any other liability that the competent authority may find to have been incurred by the offender.

581. A lockout in which the reasons are attributable to the workers shall be just, and one in which the reasons are attributable to the employer shall be unjust.

If a labour and social welfare court rules that the reasons for a lawful lockout are attributable to the employer, the said employer shall pay his workers any arrear of wages covered by clause (2) of the preceding section.

Where such a court rules that a lawful lockout is just, the employer shall be entitled to dismiss his workers without incurring any liability.

582. A lockout ordered in accordance with the provisions of this Chapter shall cease if the appropriate conciliation and arbitration board, after hearing the parties concerned, decides that the reasons out of which it arose no longer exist.

583. When work is wholly or partly resumed, the employer shall re-engage the workers who were in the service of the undertaking when the lockout was ordered.

In such a case the Ministry of Labour and the employer shall follow the procedure laid down in the second and third paragraphs of section 103 of this Code.

584. Any lockout ordered otherwise than in the cases and subject to the conditions prescribed in the preceding sections, on the basis of falsehoods or through the artificial creation of the circumstances mentioned in those sections, shall render the employers (or the authorised representatives of the employers) ordering

the lockout liable to the penalties prescribed in this Code and in the Penal Code for such acts or omissions.

CHAPTER VI. COMMON PROVISIONS AS TO STRIKES AND LOCKOUTS

585. No strike or lockout shall in any way operate to the detriment of a worker who is in receipt of wages or allowances in respect of an accident, disease, maternity or leave or on any other similar account.

586. The fact that a lockout or strike is ended by a direct settlement between the employers and workers concerned or by a court decision shall not relieve any person of his liability for offences or misdemeanours committed by him in connection with the dispute.

587. In the event of a lawful strike or lockout the labour courts shall immediately order the police authorities to provide due protection for the persons and property involved and to keep closed any establishments or businesses affected by the dispute, with the exception of such departments as the competent labour authority deems it essential to keep open.

In the event of an unlawful strike or lockout the labour courts shall order the police authorities to ensure the continuation of work by every means at their disposal, and the Executive shall have power, in accordance with section 556, to take over the management and administration of any public services provided by private undertakings.

588. The employers' right to order a lockout and the workers' right to call a strike may not be renounced: Provided that it shall be lawful to subscribe to a clause whereby the parties undertake temporarily not to exercise those rights for such time as one of the parties continues to comply with the provisions of a collective labour agreement concluded between the employer concerned and two-thirds of his workers.

The labour courts shall also have power to suspend the exercise of such rights for not more than six months if they deem such a course to be essential to a better balance in labour-management relations after the settlement of a serious economic and social dispute.

589. Any person who publicly incites others to stage a strike or lockout in contravention of the provisions of this Part shall be liable to a fine of between 100 and 500 lempiras.

590. Any person who, on the occasion of a collective dispute, participates therein with a view to fostering disorder or depriving

it of its peaceful nature shall be liable to detention and arrest by any authority until the end of the strike or lockout or until he affords a sufficient guarantee in the opinion of a labour court that he will not carry out his intentions.

Part VIII. Administrative Organisation of Labour

Chapter I. Ministry of Labour and Social Welfare

591. It shall be the duty of the Ministry of Labour and Social Welfare to

(1) approve, carry out and enforce the laws and regulations issued in the field of labour;

(2) draw up its own service regulations;

(3) administer, examine and regulate all matters relating to labour and social welfare;

(4) improve the living and working conditions of the working population;

(5) exercise supervision and carry out visits of inspection to ensure that due respect is shown for the statutory provisions governing the relations between employers and workers;

(6) examine and approve the rules of employment submitted for its consideration by state-owned and private undertakings;

(7) promote good relations between employers and workers;

(8) fix minimum wages on the basis of the recommendations made by the National Minimum Wage Committee;

(9) approve or reject the by-laws of social organisations;

(10) study and solve unemployment problems;

(11) prepare labour statistics;

(12) propose candidates for appointment by the High Court of Justice as labour judges;

(13) co-ordinate its activities in matters of social welfare with those of the Honduran Social Security Institute, subject to the relevant laws and regulations;

(14) approve and register workers' and employers' organisations;

(15) maintain a labour attorney's section;

(16) take the prescribed measures in connection with the contracts of employment made with aliens and with Honduran workers intending to take up employment abroad;

(17) promote and supervise workers' co-operative societies;

(18) conduct scientific inquiries into the problems of the working class;

(19) organise national and international labour congresses and meetings; and

(20) carry out such studies and take such measures as may be relevant to the purposes of the Labour Code and the regulations made thereunder.

592. The authorities established by this Code shall have exclusive jurisdiction in dealing with the matters referred to in the preceding section and all other authorities shall be required to furnish such assistance as they may request.

593. The Ministry of Labour and Social Welfare shall have the following administrative subdivisions:

(a) the General Directorate of Labour;

(b) the General Inspectorate of Labour;

(c) the General Directorate of Social Welfare;

(d) the Labour Attorney's Section;

(e) the National Institute of Social Studies; and

(f) such other subdivisions as may be specified in the regulations made under this Chapter or in any subsequent laws.

594. The General Directorate of Labour shall have purely administrative duties, such as the registration of social organisations, the registration of contracts and agreements made in Honduras, statistical and placement work and such other duties as are assigned to it by this Code and the regulations made thereunder.

595. The General Directorate of Social Welfare shall effectively co-ordinate the activities of the various social welfare and assistance bodies established or to be established in Honduras, with the object of ensuring their constant progress and improvement.

596. The National Institute of Social Studies shall carry out all kinds of studies and inquiries into wages, costs of living and other labour, social welfare and assistance matters; to this end it shall co-ordinate its activities with those of the other departments concerned and shall, through the appropriate bodies, regularly exchange information with other countries, both in America and in other parts of the world, so as to become acquainted with their problems, institutions and achievements in the social field. It shall also —

(a) collect information on working conditions;

(b) study, receive, file and summarise the reports which employers are required in virtue of any law, regulation or decree to send to the General Directorate of Labour;

(c) collect and maintain up-to-date information on employment and unemployment throughout the country, in accordance with such special provisions as are issued in this behalf;

(d) make recommendations to the General Directorate in connection with the forms required for the discharge of its duties; and

(e) carry out such other tasks as may be prescribed in special provisions.

Chapter II. General Directorate of Labour

597. The General Directorate of Labour shall be the body or authority responsible in the first instance for the administration of the labour laws; it shall more particularly—

(a) promote by all suitable means the best possible relations between employers and workers;

(b) encourage collective bargaining and the conclusion of collective agreements as a means of settling differences between employers and workers, and improve industrial relations and working conditions in general by endeavouring to ensure that the wages paid are fair and just and that the workers discharge their obligations as regards punctuality and efficiency at work;

(c) maintain close relations with employers' and workers' organisations and encourage them to co-operate in the application and development of labour legislation;

(d) promote the establishment of such joint boards and safety committees as are prescribed by law, regulation or agreement and of such bodies as may help to improve working conditions and industrial relations;

(e) advise the Ministry of Labour and Social Welfare in matters within its jurisdiction;

(f) approve and register the documents drawn up in connection with the supervision of labour legislation and arrange for the filing of such documents;

(g) act as conciliator in individual or collective disputes and take the necessary decisions, without prejudice to the functions of the competent authorities;

(h) recommend to the Ministry of Labour and Social Welfare such regulations or provisions as it considers necessary to improve the administration and observance of laws, regulations or collective agreements or to extend the scope of labour legislation; and

(i) impose the penalties prescribed by this Code and issue warnings in the case of minor offences.

Director-General

598. The General Directorate of Labour shall be responsible to a Director-General. Where, with the approval of the Mini. ry

of Labour and Social Welfare, the Director-General is absent or excused duty, or an objection has been made against him, the Deputy Director-General shall automatically act in his stead.

599. The Director-General or Deputy Director-General (as the case may be) shall be responsible for representing the General Directorate of Labour and for its discharge of the functions conferred on it by this Code.

Duties of the Director-General

600. The Director-General shall be responsible for directing and organising the service and shall accordingly —

(a) give the necessary instructions for the organisation and co-ordination of the various departments;

(b) ensure the proper functioning of such departments and the maintenance of good order and discipline therein;

(c) prescribe standard forms or models (whether printed or not) for all official questions, in so far as this is necessary;

(d) recommend standard forms or models (whether printed or not) to the Ministry of Labour and Social Welfare for the supervision of labour legislation and the compilation of data on labour matters in Honduras and such other data as are prescribed by law or decree;

(e) grant or refuse such permits as he is competent to grant or refuse under the provisions in force at the time;

(f) give an opinion on inquiries relating to the application of labour legislation. Where the nature of the inquiry is such that the opinion given would establish a general policy for the future in relation to a particular matter he shall first obtain the authorisation of the Ministry of Labour and Social Welfare;

(g) inform the Ministry of Labour and Social Welfare of any decisions given by the presidents or heads of district councils, the mayors of municipalities and other departmental administrative officials in labour matters for which they are competent by law, if he considers that such decisions affect the general policy or attitude of the Ministry in its application of labour legislation;

(h) supervise the operation of the administrative subdivisions of the General Directorate, with special reference to the regional or local centres mentioned in this Code;

(i) keep the Ministry of Labour and Social Welfare informed of the level of employment and standard of living, in accordance with the data supplied to him by the specialised services;

(j) co-operate with other public authorities or request such co-operation in the interests of the various departments;

(k) co-operate closely with the workers' education services, in accordance with the general or special instructions issued by the Ministry;

(l) give private reprimands or warnings to employees in the Directorate, inform the Ministry of Labour and Social Welfare of any action on their part that he considers irregular and propose such penalties as he considers adequate; and

(ll) arrange for the opening of a personal file on each official or employee. Such file shall contain full particulars of the person's identity, qualifications, seniority and conditions of service, and shall record any circumstances warranting commendation or censure: Provided that only such penalties as have already been imposed by the Ministry of Labour and Social Welfare and notified to the person concerned shall be recorded in the file.

Duties of the Deputy Director-General

601. The Deputy Director-General of Labour is the immediate assistant of the Director-General and shall act in his stead in appropriate cases, in accordance with section 598 of this Code.

602. [*Administrative duties of Deputy Director-General.*]

Heads of Section

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Trade Unions and Collective Agreements Section

605. It shall be the duty of the trade unions and collective agreements section to—

(a) gather information on national, comparative and international legislation relating to employers' and workers' organisations and keep such information properly up to date;

(b) remain constantly in touch with national employers' and workers' organisations, so as to be familiar with their problems and obtain their co-operation;

(c) give advice to the founders of occupational associations, in accordance with this Code;

(d) request the production of the original minutes of the general meetings and managing committees of occupational associations, in accordance with this Code;

(e) register collective agreements and take the appropriate action in accordance with the relevant legislation;

(f) co-operate with the inspection services and higher authorities in the drafting and preparation of collective agreements;

(g) file and preserve the originals of all collective agreements submitted for registration and transmit copies to the General Directorate;

(h) co-operate with the registration of social organisations section;

(i) issue instructions for the drafting of collective agreements and register any extensions and amendments, taking the necessary action in each case;

(j) give notice of the termination, amendment or extension of collective agreements and make such observations or entries as are appropriate;

(k) produce such recommendations and reports as are requested of it in matters within its sphere of competence; and

(l) carry out such other tasks as may be prescribed in laws, decrees or regulations.

Registration of Social Organisations Section

606. It shall be the duty of the registration of social organisations section to—

(a) maintain an up-to-date register of employers' and workers' social organisations;

(b) examine the by-laws of trade unions which apply for registration and any amendments thereto;

(c) file and preserve the by-laws of trade unions and any amendments thereto, and record any cases of dissolution or cancellation;

(d) notify the General Directorate of Labour of any action taken in connection with the registration of trade unions and of any draft by-laws or amendments to by-laws that are received;

(e) produce such reports as are requested of it in matters within its sphere of competence.

607. Applications for the registration of social organisations shall be submitted to the General Directorate of Labour, which shall follow the procedure laid down in Chapter IV of Part VI of this Code.

608. The procedure followed in connection with amendments to by-laws shall be the same as is prescribed for applications for registration.

609. The registration of social organisations section shall register such decisions taken or contracts concluded by social organisations as are liable to registration in accordance with this Code.

CHAPTER III. GENERAL INSPECTORATE OF LABOUR

610. Through its staff of inspectors and women welfare officers the General Inspectorate of Labour shall ensure that employers and workers comply with all the statutory provisions governing labour and social welfare.

In matters covered by the Law establishing the Honduran Social Security Institute and the regulations made thereunder the Inspectorate shall furnish such assistance as the inspectors employed by the said Institute may request.

611. The General Inspectorate of Labour shall also act as an advisory body on problems of law and shall accordingly be responsible, through its chief, for answering inquiries received from other departments of the Ministry of Labour and Social Welfare or from employers and workers in connection with the manner in which the statutory provisions within its sphere of competence have to be applied.

In such cases as it deems desirable the Inspectorate shall give notice in the official gazette of the Ministry of Labour and Social Welfare or in one of the main daily newspapers of the Republic of any questions on which it has given an advisory opinion and of any decisions taken by the labour and social welfare authorities, so that they may serve as a guide to others.

612. The head of the General Inspectorate of Labour shall have the same qualifications as are required of labour judges.

Persons appointed as labour inspectors or women welfare officers shall be of Honduran nationality, have come of age and not be ministers of any church; they shall fulfil the conditions prescribed in section 671 and shall pass a proficiency examination to the satisfaction of the chief of service in the fundamental principles of labour, labour legislation, inspection work and social welfare.

All other things being equal, preference shall be given in the recruitment of inspectors and women welfare officers to pupils of the Social Welfare School; persons appointed to such posts shall in any event hold a diploma awarded by the School.

613. The General Inspectorate of Labour shall be deemed to be a party to any individual or collective dispute of a legal nature involving workers who have not yet come of age and to any proceedings instituted for the purpose of protecting the maternity rights of women workers, save where in the latter case the Honduran Social Security Institute is a party to such proceedings.

Duties

614. It shall be the duty of the General Inspectorate of Labour to—

I. ensure compliance with the Labour Code, the regulations made thereunder, the various collective agreements and all other mandatory provisions by means of

(a) the inspection of centres of employment;

(b) the more particular inspection of family employment, home work and factories;

(c) the examination of inspectors' reports with a view to suggesting appropriate measures;

(d) return visits of inspection to ensure that earlier defects have been remedied; and

(e) the submission of reports recording the results of its inspection work and suggesting the necessary measures for the general protection of the working population;

II. assist the other departments of the Ministry by arranging for its inspectors to take any necessary action;

III. arrange for its inspectors to act as conciliators in industrial disputes;

IV. check the membership of safety committees;

V. assist in the revision of collective agreements by making appropriate inquiries into the living conditions of the workers and the economic circumstances of undertakings;

VI. maintain a resident staff in the Central District and the various provinces. This shall involve—

(a) the appointment and transfer of inspectors, women welfare officers, etc.;

(b) inspection and supervision; and

(c) commendations and penalties, as appropriate;

VII. organise public meetings every six months, which shall be attended by all the staff of the Inspectorate and all welfare workers, nurses, visitors and other similar persons, with the object of studying their common problems in giving effect to social legislation.

Every trade union shall be entitled to be represented at these meetings by a delegate with the right to speak and vote, and may furthermore ask for such meetings to be held for the purpose indicated above.

615. The labour inspectors may be national, provincial or local officials and shall be appointed by the Ministry of Labour and Social Welfare.

The General Inspectorate of Labour shall be responsible to a chief inspector or deputy chief inspector, who shall be legally empowered to replace the chief inspector in cases where, with the approval of the Ministry of Labour and Social Welfare, the latter

is absent or excused duty, or an objection has been made against him.

Labour Inspectors

616. Labour inspectors shall be the enforcement officials of the Ministry and shall directly supervise the application of labour legislation. In the discharge of their duties inspectors shall co-operate closely with their chief of section and the higher authorities, shall follow the procedure laid down for the whole of the service and shall keep their superiors informed of their activities and investigations.

617. Labour inspectors and women welfare officers shall have the following rights and obligations:

(a) They may examine all account books, wage records, payrolls, receipts and other documents that effectively assist them in carrying out their duties.

(b) Whenever they encounter unjustified opposition, they shall report the matter to the appropriate labour court and, in special cases where they have to take immediate action, they may on their own responsibility demand assistance from the police authorities or any police officer, for the sole purpose of ensuring that they are not prevented from carrying out their duties or are not obstructed therein.

(c) They may inspect the hygiene conditions obtaining in work-places and may check the guarantees afforded by such work-places for the personal safety of the workers employed therein. They shall more particularly ensure that all provisions enacted for the prevention of employment injuries are properly observed.

(d) They shall assist in all industrial disputes that come to their notice, whether between workers and employers or between workers only or between employers only, with the object of preventing such disputes from spreading or of settling them by conciliation, without recourse to judicial proceedings.

(e) They shall co-operate at all times with the judicial authorities responsible for labour matters and shall also co-ordinate their activities with those of the teachers employed by the Ministry of Public Education, with the object of promoting the cultural development and social education of the workers.

(f) They shall be entitled to send telegrams free of charge if they have to communicate on urgent cases or matters of official business with their superiors, the police authorities or the labour courts.

(g) The documents and reports which they prepare in connection with their duties shall be deemed to be a true record until

conclusive evidence of their inaccuracy or lack of impartiality has been produced.

(*h*) Inspectors shall more particularly ensure that employers and workers show a proper regard for all principles that form the basis of satisfactory labour-management relations. They shall likewise ensure that the ban on night work for young persons is observed and shall notify the competent authority of any contraventions, so that penalties can be imposed. Lastly, they shall carry out all instructions they receive from their superiors in connection with their work.

618. For the purposes of the preceding section every labour inspector shall have power, as and when necessary and on producing evidence of his identity, to visit any undertaking at any hour of the day or night; he shall also be entitled to question any employee without the employer or any witness being present and to ask to see any kind of document or register required to be kept in accordance with this Code. If any irregularities are found in the course of such a visit, he shall record the fact in his report. This report shall be sent to the authority to which the inspector is responsible, which shall impose such penalties as are appropriate in the light of the report and shall order such measures to be taken as are required by law.

Every labour inspector shall be required to carry out the investigations referred to in this section on receipt of a complaint, whether orally or in writing, from any person concerned, to the effect that a contravention of this Code or of the regulations made thereunder has been committed in an undertaking.

619. The report shall be read to the employer or his representative and to any worker or workers involved in the contravention, and the inspector shall sign it jointly with the offenders. If any of the offenders is unable or unwilling to sign, the fact shall be recorded in the inspector's report. The reports drawn up by inspectors shall be submitted to the chief of section by the next working day or within such period as is prescribed by the General Inspectorate of Labour.

620. If the General Inspectorate of Labour decides to impose a penalty, it shall order the inspector to draw up a second report, which shall be known as the "intimation" or "notification" of the penalty. The alleged offender may state his defence in the original report or furnish the General Inspectorate of Labour within three days with a written statement of any circumstances that he considers to be in his favour before a decision is given. The time allowed for bringing an appeal against the decision of the chief inspector to impose a penalty shall be reckoned from the day following the date of the intimation or notification of the penalty.

621. An appeal against a decision to impose a fine shall lie to the General Inspectorate of Labour in the first instance, and to the Ministry of Labour and Social Welfare in the second instance.

Such appeals and the evidence in support of them shall be submitted within the time limits and in the manner prescribed in the Code of Administrative Procedure, due allowance being made, in appropriate cases, for the distance over which the documents have to be transmitted.

622. Reports of offences, intimations and notifications shall be drawn up in accordance with the models prescribed by the General Directorate of Labour; every report of an offence shall indicate the right of the person concerned to state his defence either in the report or by means of a written statement within three days, and every intimation or notification shall indicate the possibility of appeal in accordance with this Code and the time limit for bringing such appeal.

623. Labour inspectors, as agents of the law, shall refrain from entering into discussions as to the material or specific reasons for their presence, and shall only invoke their official capacity.

624. Once proceedings have commenced, no labour inspector may permit such proceedings to lapse without the knowledge and permission of his superiors.

625. Any failure to obey the instructions issued by a labour inspector in the exercise of his statutory powers or any attempt to prevent or obstruct him in the discharge of his duties shall render the offender liable to a fine of between 20 and 500 lempiras. A repetition of the offence shall render the offender liable to a 50 per cent. increase in the fine previously imposed. Such fines may be collected by court order.

Fines shall be imposed by the appropriate labour inspector both on the person directly responsible for the offence and on the employer in whose undertaking, industry, business or establishment the offence was committed, save where the said employer can prove that he was unaware of the offence or was not a party to it. Where an offence is committed by a public or private company, association or institution, the penalty shall be imposed on the person acting as the employer, director, manager or head of the undertaking, establishment, business or place where the work was being done; Provided that the body corporate shall be jointly liable with him for any financial responsibility incurred.

626. If a labour inspector or woman welfare officer discloses information obtained in the course of an inspection or visit, reveals manufacturing or trade secrets that have come to his or her know-

ledge in the course of duty, records untrue particulars in any document or report, accepts gifts from any employer, worker or trade union, exceeds his or her authority or is otherwise guilty of a serious breach of duty, he or she shall be immediately dismissed, without prejudice to any criminal, civil or other liability incurred.

627. An inspector or woman welfare officer shall be suspended without pay for a period not exceeding 15 days and shall be dismissed on more than one repetition of the offence if he or she

(a) fails to report to the competent authority within three days of inspecting or visiting a workplace;

(b) fails to pay regular visits at the prescribed intervals to any workplace in the area entrusted to his or her supervision;

(c) fails in any other way to discharge official duties.

628. Any person shall be entitled to notify a labour inspector or woman welfare officer of any offence committed by an employer or worker against the labour or social welfare laws.

Technical Collaborators and Supervisors

629. The technical collaborators shall form part of the labour inspection service and shall co-operate with it in accordance with the instructions of the General Inspectorate of Labour by applying their specialised knowledge of a particular branch of activity for the benefit of the branch concerned.

630. Supervisors shall have the special duty of supervising the work of the labour inspectors in accordance with the instructions of the General Inspectorate of Labour. For the purpose of discharging this duty they shall have the same powers as labour inspectors. Their work shall consist essentially in ascertaining whether the inspections ordered have been carried out and, if so, whether they have been carried out at the time and in the manner ordered, and in making verificatory inspections and performing special or particularly important tasks.

Such supervisors shall report on their special missions and normal supervision work directly to the General Inspectorate of Labour and shall, *inter alia*, notify any irregularity which is liable to prejudice the reputation of the inspection service. They shall invariably endeavour to discover whether workers or employers have any complaints as to the manner in which inspections are or have been carried out.

631. Technical collaborators and supervisors shall submit periodic reports in accordance with the instructions of the General Inspectorate of Labour.

Chapter IV. Legal Section

632. The legal section shall be responsible to the General Inspectorate of Labour; its duties shall be to

(1) prepare draft laws, decrees and regulations for the various branches of activity covered by the Ministry of Labour and Social Welfare;

(2) draw up reports and attend to such other formalities as are necessary when an appeal is lodged against an action taken by an official of the Ministry;

(3) assist the other departments of the Ministry by answering any legal inquiries submitted to it by the heads of such departments;

(4) answer any inquiries submitted by other authorities, workers' and employers' associations and private individuals, the head of the section being responsible for deciding the cases in which action is required;

(5) reconcile conflicting applications for registration by workers' and employers' associations;

(6) deal with cases in which the liability of officials of the Ministry is involved;

(7) take appropriate action in court cases in which the Ministry is concerned;

(8) keep copies of the decisions and verdicts given by the labour courts, classifying them in chronological order and separately for each court, and a general index of such copies in the alphabetical order of the subjects dealt with and the names of the parties.

633. [*Assistance from other departments.*]

634. [*Keeping of records.*]

Chapter V. Labour Attorney's Section

635. The labour attorney's section shall be directly responsible to the Ministry of Labour and Social Welfare; its duties shall be to

(1) represent or advise the workers or their unions, on request, in their dealings with the competent authorities when differences or disputes arise with the employers in connection with contracts of employment;

(2) seek such ordinary and extraordinary remedies as may be necessary in a worker's defence; and

(3) ensure that the justice dispensed by the labour courts is prompt and expeditious by taking such action as is appropriate

under this Code to guarantee that orders and decisions are made within the time limits fixed by law.

636. A labour attorney shall have the same qualifications as are indicated in section 675.

637. If the labour attorney's section considers that a case is legally indefensible, it shall inform the person concerned that the section will not undertake to represent him.

638. The section may likewise refuse to represent or advise a worker if he asks for its assistance in addition to that of private counsel.

639. In the discharge of its legal duties the labour attorney's section may attempt to reconcile the parties and to this end may summon them to appear before it.

640. Where the settlement suggested by the labour attorney's section is accepted by the parties, the case shall be considered closed and the appropriate document drawn up.

641. The labour attorney's section shall give the workers such assistance in court or out of court as they need in labour questions. Such assistance shall be absolutely free of charge and shall be limited to the claims of workers that relate to labour questions. It shall be given in such matters as the recovery of wages, claims for vacation leave, compensation for dismissal, accidents or occupational diseases, remuneration for overtime or night work, remuneration for work on public holidays or rest days, the return or recovery of sums improperly deducted and the protection of women and young workers.

Such assistance shall extend to all voluntary and administrative proceedings directly concerned with the labour questions in which the attorney intervenes.

642. There shall be one or more labour attorneys to discharge the duties prescribed by this Code in each economic area or district designated by the Ministry of Labour and Social Welfare for the purpose. Such attorneys shall be appointed and removed from office in accordance with the same rules as apply to the appointment and removal of judges.

The labour attorney's section of the Ministry of Labour and Social Welfare shall be directed by an attorney-general and a deputy attorney.

643. Where the proceedings contemplated by a worker are based on an employment injury, the opinion of the medical section shall be sought before the proceedings are instituted. If the

opinion is unfavourable to the plaintiff's case, the labour attorney's section shall not act on his behalf.

644. [*Duties of chief of section.*]

645. [*Provision of information by other authorities.*]

646. The labour attorney's section, acting through the Ministry of Labour and Social Welfare or, where appropriate, the provincial governor, may apply for a court order to be made for the enforcement of any decision it has taken in the discharge of its duties.

Chapter VI. General Directorate of Social Welfare

647. The duties of the General Directorate of Social Welfare shall be discharged through the following administrative subdivisions:

(a) the general protection section;
(b) the advisory medical section;
(c) the occupational health section;
(d) the social insurance section;
(e) the women and young workers investigation section;
(f) the co-operative societies section.

The General Directorate shall co-ordinate the work of these different subdivisions.

Chapter VII. Conciliation and Arbitration Boards

648. It shall be the duty of conciliation and arbitration boards to examine and settle the differences and disputes arising between capital and labour in their spheres of jurisdiction.

649. Conciliation and arbitration boards shall be established and run on a permanent basis in the chief towns of the various provinces. In provinces where the needs of the different economic sectors are such that two or more conciliation and arbitration boards have to be set up, the Ministry of Labour and Social Welfare may set up as many boards as are required and shall define the sphere of jurisdiction of each.

650. Each conciliation and arbitration board shall consist of a representative of the Ministry of Labour and Social Welfare, who shall act as chairman, and one workers' and one employers' representative for each economic sector or group of trades.

651. Where a dispute affects only one economic sector or group of trades, the board shall consist of the workers' and employers' representatives for the sector or group concerned and a representative of the Government.

652. Where a dispute affects two or more economic sectors or groups of trades, the board shall consist of the president of the central organisation and the workers' and employers' representatives for the sectors or groups concerned.

653. For the purpose of appointing the workers' and employers' representatives, the Ministry of Labour and Social Welfare shall, on the tenth day of October of each year, publish a list of the economic sectors and groups of trades which have to be represented on each board, in accordance with a classification to be made by the Ministry of Labour and Social Welfare in the light of the applications submitted by the workers' and employers' organisations in each area.

654. If the Ministry of Labour and Social Welfare considers that the industrial situation generally makes it unnecessary for all the various sectors to be represented, the boards shall consist of one government representative, who shall act as chairman, and not more than three workers' and three employers' representatives.

655. The plenary meeting of a conciliation and arbitration board shall have power to—

(1) conduct conciliation proceedings in connection with any collective differences or disputes arising between workers and employers or between workers only or between employers only in connection with contracts of employment or matters closely related to contracts of employment, and affecting all the economic sectors represented on the board for the province concerned;

(2) conduct arbitration proceedings for the settlement of the differences and disputes referred to in the preceding clause in cases where no agreement has been reached between the parties;

(3) decide whether a stoppage of work affecting all the economic sectors in the provincial capital, province or area is lawful or unlawful, after a file on the matter has been prepared in the manner prescribed in this Code;

(4) draw up its own standing orders; and

(5) discharge any other duties entrusted to it by this Code or the regulations made thereunder.

656. Where a dispute does not affect all the economic sectors mentioned in the preceding section, it shall be dealt with by a

special board for the sectors concerned, which shall conduct the necessary conciliation and arbitration proceedings.

657. A deputy member shall be appointed for every regular member.

658. The workers' and employers' members of a conciliation and arbitration board shall hold office for two years, save where they resign or are removed from office or where their nomination is withdrawn, and may be re-elected, save where they have been removed from office for some reason which has been proved to be attributable to them.

659. The nomination of a representative may be withdrawn at the request of two-thirds of the workers or employers belonging to the group represented. The request shall be submitted to the Minister of Labour and Social Welfare, who, after checking that the above condition is fulfilled, shall make the appropriate announcement and call upon the deputy member to take office. Where there is no deputy member or where his nomination is also withdrawn, the request shall contain proposals for the nomination of the necessary substitutes.

660. The resignation of a workers' or employers' representative shall be submitted to the Minister of Labour and Social Welfare. After the reasons given for the resignation have been considered, the resignation itself shall be accepted or refused, as the case may be.

661. Where a representative is temporarily or permanently absent from the meetings of a conciliation and arbitration board for reasons other than his removal from office or the withdrawal of his nomination, his place shall be taken by the appropriate deputy member. If, after being summoned by the chairman of the board, the deputy does not attend within ten days, the Ministry of Labour and Social Welfare shall nominate a substitute.

662. Where a workers' or employers' representative is prevented from examining a case because an objection has been lodged against him, because he has a valid excuse or for some other reason, his deputy shall be summoned to attend. If the deputy is similarly prevented, the Minister of Labour and Social Welfare shall appoint a representative to take his place.

663. The workers' and employers' members of conciliation and arbitration boards shall be appointed at meetings organised and held in accordance with rules to be issued by the Ministry of Labour and Social Welfare for the purpose.

Part IX. Judicial Authorities Specially Responsible for Labour Matters

Chapter I. Organisation and Jurisdiction of Labour Courts

Division I. General Provisions

664. Cases that come before the judicial authorities responsible for labour matters shall be dealt with in accordance with this Code.

665. The purpose of the judicial authorities responsible for labour matters is to settle any legal disputes arising directly or indirectly out of contracts of employment.

They shall also consider matters connected with the performance of obligations arising out of employment relationships, matters connected with trade union privileges, the granting of permission for young persons to institute proceedings, the recognition of strikes as being lawful, the withdrawal of legal personality, the dissolution and liquidation of occupational associations, disputes, enforcement orders and appeals under social insurance legislation and the confirmation of arbitration awards.

The examination of economic disputes between employers and workers shall continue to be governed by the special laws on the subject.

666. In labour matters justice shall be administered by

(a) labour courts, as courts of first or only instance;

(b) labour courts of appeal, as courts of second instance, where such courts exist; and

(c) the High Court of Justice, as the supreme court of appeal.

667. Labour judges shall discharge their duties independently and shall be subject only to the Constitution and the law. A lower judge shall nevertheless be required to respect and carry out the decisions of a higher judge if the latter, on appeal, overrules or alters the decisions of the former.

668. No judge shall be dismissed from office except for the commission of an offence for which he is sentenced to imprisonment or declared to be guilty of a crime, or if he is guilty of misconduct or fails to carry out the obligations of his office. The facts shall be established by the High Court of Justice after a summary investigation and a hearing of the person concerned. Transfers of judges from one court of appeal to another shall be made in accordance with the law.

669. Once a matter has been submitted to a labour court in accordance with the legal procedure, the court shall conduct all the necessary proceedings on its own initiative and shall endeavour to curtail the normal course of the hearings as far as possible. The final decision of the court shall have the force of a judgment at law.

670. No judge or labour inspector shall be elected to any office as a representative of the people. Any infringement of this rule shall render the election null and void.

671. No person shall be appointed as a member or deputy member of a labour court or as an official or employee thereof if he holds executive office in a social organisation of any kind or if he holds office as the representative of such organisation in the courts or elsewhere or if he has held such office within the two years immediately preceding his nomination.

No person shall be appointed as aforesaid if he has been convicted of a criminal offence or a contravention of the labour or social welfare laws within the two years immediately preceding his nomination.

672. In so far as they do not conflict with the letter or spirit of the provisions governing the organisation of the labour courts, as contained in this Part, the provisions of the Law respecting the organisation and duties of the ordinary courts shall also apply to labour courts.

In the absence of relevant provisions elsewhere in this Part, the provisions of this Chapter shall apply to the other matters covered by this Part, in so far as they are not inconsistent therewith.

673. The labour courts shall sit on days other than working days and outside working hours if delay would be detrimental to the parties or to the proper dispensation of justice or would render any decision taken ineffective.

Division II. Labour Courts

674. Labour courts shall be set up for such economic areas as the High Court of Justice may determine, having regard to—

(a) the number of workers employed in the area concerned;

(b) the degree of industrialisation;

(c) the number of occupational associations of workers and employers; and

(d) the findings of a report to be submitted by the Ministry of Labour and Social Welfare after consultation with the General Inspectorate of Labour.

The number of courts shall be fixed by the High Court of Justice, which may increase or reduce the number as it deems fit.

In provinces where there is no special labour judge, his duties shall be discharged by the appropriate civil judge.

675. Every labour judge shall be a barrister practising in the courts of the Republic and shall preferably be a specialist in labour matters; he shall be appointed and removed from office by the High Court of Justice in accordance with the same rules as apply to the removal of any other judge. He shall fulfil the other conditions prescribed by law and shall enjoy the privileges and immunities granted to all other judges.

676. Every clerk of a labour court shall furnish evidence of his having worked as the clerk of an ordinary court for two years or of his having studied for at least two years at the Faculty of Legal and Social Sciences of the National Independent University. Every receiver of a labour court shall furnish evidence of his having had one year's practical experience or one year's study at the above-mentioned Faculty.

677. In addition to his other statutory duties, the clerk shall send a quarterly report to the General Inspectorate of Labour on all proceedings of the court that are relevant for statistical purposes.

678. Notices shall be served by the clerk of the court, who shall authenticate them by affixing the seal of the court under his own surname and title.

679. A labour court shall be the authority of first instance within its sphere of jurisdiction for—

(1) all disputes arising out of contracts of employment;
(2) all proceedings instituted for the dissolution of social organisations;
(3) all complaints and differences of opinion arising in connection with the application of the workmen's compensation laws;
(4) all infringements of the labour and social welfare laws and regulations, in which connection it shall have power to impose the appropriate penalties; and
(5) all other matters prescribed in this Code.

680. A labour judge may delegate his powers to the clerk of the court for a period not exceeding eight days if he has to be absent from the seat of the court for reasons connected with his duties.

The receiver of the court shall act as clerk during the period referred to in the preceding paragraph.

Division III. Labour Courts of Appeal

681. Labour courts of appeal shall be set up in such economic areas as the High Court of Justice may determine.

The number of courts shall be fixed by the High Court of Justice, which may increase or reduce the number as it deems fit.

Until such time as labour courts of appeal are set up in the Republic, their duties shall be discharged by the ordinary courts of appeal.

682. Every labour court of appeal shall consist of three judges and two deputy judges; its proceedings shall be directed by a president, who shall be one of the regular members.

The president shall hold office for one year, reckoned from the second day of January; each member of the court shall hold office in turn, in order of seniority.

The judges shall enjoy the rank and order of precedence corresponding to their seniority in the service of the court and shall hold office for three years; they may be removed from office for the same reasons as judges of the ordinary courts.

683. A judge of a labour court of appeal must—

(1) be of Honduran nationality, be over 30 years of age, be in possession of his civil rights and not be a minister of any church;

(2) be a barrister, and preferably a specialist in labour law;

(3) be of good moral standing and recognised independence in his views;

(4) have practised his profession for at least five years or have held office as a judge for at least one year.

684. No person who is ineligible to hold office as a labour judge may hold office as a judge of a labour court of appeal.

685. No relatives who are less than four times removed by blood or twice by marriage may hold office simultaneously as judges of the same labour court of appeal.

686. The labour courts of appeal shall review the decisions given by labour judges or conciliation and arbitration boards if an appeal is lodged against them or an opinion on them is requested.

687 and **688.** [*Procedure.*]

689. [*Appointment of court officials.*]

Chapter II. - Jurisdiction

690. The decision as to which labour court has jurisdiction in any particular case shall be taken on the basis of the place where the services have been performed or the place where the defendant has his residence, at the option of the plaintiff.

691. Proceedings may be instituted against a public body, independent administration or social institution or agency only if the appropriate administrative procedure has been exhausted.

692. In proceedings instituted against the State, jurisdiction shall lie with the labour judge for the place where the services have been performed or the place where the plaintiff has his residence, at the option of the latter, irrespective of the amount involved.

693. In proceedings instituted against a municipality, jurisdiction shall lie with the labour judge for the place where the services have been performed.

694. In proceedings instituted against a public establishment or official agency or undertaking, jurisdiction shall lie with the judge for the place where the defendant has his residence or the place where the services have been performed, at the option of the plaintiff.

695. In proceedings instituted against a social welfare fund or institution or a social institution or agency, jurisdiction shall lie with the judge for the place where the fund or institution has its registered address or the place where application was first made for payment to be effected by the defendant.

696. Labour judges shall give final decisions in all cases in which the amount involved does not exceed 200 lempiras and decisions in first instance in all other cases.

697. In municipalities where there are no labour courts, cases which would otherwise be within their jurisdiction shall be dealt with by the civil judges.

698. Where a claim is directed against two or more persons simultaneously and two or more judges have jurisdiction, the choice of judge shall be made by the plaintiff.

699. The High Court of Justice shall examine appeals on points of law and shall confirm the awards made in arbitration proceedings.

The labour courts of appeal shall be the authorities of second instance for the examination of cases considered in first instance by the labour judges.

CHAPTER III. PUBLIC PROSECUTOR'S OFFICE

700. The duties of the public prosecutor's office in relation to the judicial authorities responsible for labour matters shall be discharged by the labour attorney-general and by the provincial and district labour attorney's sections set up in accordance with this Code.

701. The public prosecutor's office shall intervene in any labour suit in which one of the parties is a person under judicial disability having no one to represent him.

702. The public prosecutor's office shall intervene on behalf of the State and in the interests of justice, if the Ministry of Labour so requests, in any proceedings involving occupational associations or the recognition of a strike.

Part X. Procedure in Labour Suits

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CHAPTER XIII. PROCEDURE FOR THE SETTLEMENT OF COLLECTIVE DISPUTES OF AN ECONOMIC AND SOCIAL NATURE

Division I. Direct Settlement

Representatives

790. In the event of a collective dispute which might result in a suspension of work or which has to be settled by compulsory arbitration, the trade union or workers concerned shall nominate three representatives from among their number to submit their claims to the employer or the person representing the employer.

These representatives must be of Honduran nationality, have come of age, be actually employed in the undertaking or establishment concerned and have been in its employment for more than six months (or for the whole time that it has been in operation if it has not been in existence for six months).

Opening of Discussions

791. The owner of the establishment or undertaking or his representative shall be required to receive the workers' representatives within 24 hours of the submission of the claims, so that discussions can be opened. If the person to whom the claims are submitted considers that he has no authority to deal with them, he shall ask for such authority to be conferred on him or refer the claims to the employer within 24 hours of receiving them, at the same time notifying the workers to that effect. In no circumstances shall the opening of discussions with a view to a direct

settlement be postponed for more than five working days, reckoned from the submission of the claims.

Duration of Discussions

792. Discussions with a view to a direct settlement may continue for as long as the parties deem appropriate; but if the workers so demand, they shall be given a clear answer to all or any of their claims within ten days of the opening of the discussions.

Agreement

793. If a complete or partial settlement of the claims is reached, a collective agreement (or covenant in the case of non-unionised workers) shall be signed and a copy sent to the Ministry of Labour through the appropriate labour inspector within 24 hours of signature.

The General Inspectorate of Labour shall ensure that the agreement does not conflict with the statutory provisions issued for the protection of the workers and, that the provisions of the agreement are strictly observed by the parties.

Disagreement

794. If it is not possible to reach a direct settlement of all or any of the claims, a document recording the fact shall be drawn up and the differences submitted for conciliation.

Division II. Mediation

795. Mediation services shall be established in the capital of the Republic and in other important centres of employment; each service shall consist of one or more mediators appointed by the Ministry of Labour and Social Welfare.

796. Every mediator shall fulfil the following conditions:

(1) be of Honduran nationality and be over 25 years of age and of good repute;

(2) have sufficient education, a knowledge of the labour problems of the region, and be endowed with personal qualities that render him worthy of the confidence of both employers and workers.

797. Mediators shall—

(1) keep in contact with the employers and workers in the region or with their associations in order to acquire a thorough knowledge of their problems, so as to be able to prevent and settle industrial disputes;

(2) encourage collective bargaining, so that it becomes the normal method of establishing conditions of employment;

(3) promote the establishment of committees of employers and workers in the principal centres of employment, for the discussion and amicable settlement of any labour problems that arise between them;

(4) advise employers and workers or their associations on all matters affecting the relations between them;

(5) carry out any investigations or inquiries necessary for the better performance of their duties. This they may do either on their own authority or through the labour inspectors; they may, if necessary, be accompanied by such experts or technical advisers as are appropriate to the nature of the case; and

(6) direct the labour inspectors to take such action as is necessary to ensure that their mediation is successful.

Mediators shall also submit reports to the conciliation and arbitration boards when asked to do so.

798. In the event of a dispute the mediator shall approach the parties with a view to their submitting their claims to a committee of employers and workers; he shall advise the committee if asked to do so. If no such committee exists, or if it exists but does not settle the dispute, the mediator shall attempt to settle the dispute himself, requesting the party that considers itself injured to submit its claims.

799. The claims shall be presented to the mediator in duplicate.

If, after examining them, he is of the opinion that the matter does not constitute an industrial dispute, he shall refuse to handle it, explaining to the parties concerned the reasons for his decision.

Where the dispute is found to concern a point of law, the parties shall submit it to the competent judicial authority.

If the dispute is found to concern an economic matter, the mediator shall open a file on the case with one copy of the claims and shall transmit the other copy to the adverse party, which shall submit its reply within a time limit to be fixed by the mediator at his discretion.

800. The reply shall also be submitted in duplicate to the mediator, who shall place one copy in the file on the case and shall transmit the other to the claimant.

801. If the reply is unfavourable, the mediator shall open discussions within the next three days, with a view to reconciling the parties; he shall then accept and collect evidence and take whatever measures he may deem fit, to the best of his knowledge and belief, without having to observe any particular legal formalities, and shall endeavour to induce the parties to reach an amicable settlement.

To this end the mediator shall propose whatever compromise he deems appropriate and shall avail himself of all the means at his disposal.

802. The mediator shall send a report to the Ministry of Labour and Social Welfare as soon as his mediation work has been completed.

Division III. Conciliation

Procedure before Conciliation Boards

803. No set form shall be required for the documents, claims or arguments submitted to a conciliation board. The parties shall make clear what matters are at issue and the reasons for the same.

804. Once a matter in dispute has been submitted to a conciliation board, the chairman of the board shall appoint a date and time for a hearing of both parties, which shall be held within three days, the defendant being warned that he will be deemed to disagree with any solution found if he fails to appear. When the notice is served, the defendant shall be furnished with a copy of any statement of claims submitted by the plaintiff. If, for any reason, notice cannot be served on the defendant at the place where the board has its seat, the time limit allowed shall be increased by one day for every 20 kilometres distance or part thereof.

805. On the appointed day and at the appointed time, the employer and workers concerned shall appear before the board in person or shall appoint a duly authorised representative to appear on their behalf. The conciliation proceedings shall then be held as follows:

I. The plaintiff shall begin by explaining his claim, that is to say what he seeks to obtain and why. This explanation may be given in the form of a reading of the original claim in the file. The plaintiff may also quote the legal arguments on which his claim is based.

II. The defendant shall make such reply as he deems appropriate in defence of his interests and may also quote arguments in substantiation of his objections.

III. After this reply, the parties may make further statements and counter-statements if they wish to do so.

IV. If the parties do not agree, the board shall endeavour to bring about an amicable settlement and to this end the chairman, after consulting the other representatives, shall put forward such solution as in his opinion is likely to put an end to the dispute, at the same time explaining to the parties that the solution proposed in the light of their arguments is fair and just.

V. If the parties reach agreement, the solution proposed shall put an end to the dispute.

806. Within six days of the last hearing, the conciliation board shall give such decision as it deems appropriate for the settlement of the dispute and shall immediately summon the parties' representatives to inform them of its decision.

All decisions of the board shall be adopted by a majority vote.

If the parties agree to the decision, its terms shall be deemed to constitute a collective agreement between them.

If the parties do not agree to the decision, the board shall summon them (or their representatives) to a hearing to be held as soon as possible, at which it shall invite them to submit the dispute to arbitration; a written record of the outcome of the hearing shall be taken.

Division IV. Arbitration

Voluntary Arbitration

807. Employers and workers may agree that any disputes arising between them out of their employment relationships are to be settled by an arbitrator.

Terms of Agreement to Submit to Arbitration

808. The terms of the agreement to submit to arbitration shall invariably be set down in writing, whether in the individual contract of employment, in the collective contract or agreement or in some other later document.

Appointment of Arbitrators

809. The parties may appoint one or more arbitrators, at their own discretion; such arbitrators may be chosen from national corporations of any kind.

If the parties have not agreed on how the arbitrators are to be appointed, each of them shall appoint one arbitrator and the arbitrators so appointed shall, as their first duty, appoint a third, who with the other two shall constitute the tribunal. If the two arbitrators appointed by the parties cannot agree within 24 hours, the third arbitrator shall be the appropriate labour inspector or, where there is no such inspector, the local mayor.

If either of the parties fails or is unwilling to appoint an arbitrator, the local labour judge shall appoint one within three days of being asked to do so.

Replacement of Arbitrators

810. Where an arbitrator is absent or prevented from performing his duty, he shall be replaced in accordance with the same procedure as was followed for his appointment.

If one of the parties is unwilling to replace the arbitrator he appointed, the other two arbitrators shall appoint a replacement within three days of calling upon the party concerned to do so.

Arrangement of a Hearing

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Time Limit for Making an Award

812. The arbitrators shall make their award within ten days reckoned from the appointment of the tribunal. This time limit may be extended by the parties.

Form of Award

813. The document containing the award shall open with an account of the proceedings, followed by the award itself, and shall as far as possible take the form adopted for decisions given by judges in labour suits.

Fees and Expenses

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Procedure Laid Down by Collective Agreement

815. Where the parties have made provision in a collective agreement for permanent arbitration boards or tribunals to be set up, the terms of the agreement shall be followed in all matters relating to their establishment, jurisdiction and procedure for settling such disputes as may arise. Only in the absence of an express provision shall the rules contained in this Chapter be applied.

Force of Awards

816. Notice of the arbitration award shall be given in person to the parties; the award shall acquire the force of a judgment at law and the only appeal entertainable shall be one against its confirmation, as mentioned in the following section.

Appeals against the Confirmation of Awards.

817. A special appeal shall lie to the High Court of Justice against the confirmation of arbitration awards covered by the preceding sections.

Such appeals may be lodged by either of the parties within three days of the notification of the award; in this case the original copy of the award shall be transmitted to the High Court of Justice within the next two days.

Examination of Appeals

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Confirmation of Awards

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Compulsory Arbitration

820. Collective labour disputes which arise in public services and in which no agreement can be reached through negotiations for a direct settlement or through conciliation proceedings shall be submitted for compulsory arbitration.

Collective disputes arising in other undertakings or establishments may be submitted for arbitration if the parties so agree.

Arbitration Boards

821. The arbitration boards dealing with collective disputes for which arbitration is compulsory shall be set up in the manner prescribed in Chapter VII of Part VIII of this Code and shall operate in the manner prescribed in Division V of this Chapter.

Fees

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Persons Not Eligible to Act as Arbitrators

823. No person who has been directly or indirectly concerned in representing the parties at any stage of the negotiations for a direct settlement or at any stage of the conciliation proceedings shall be eligible to sit on an arbitration board or tribunal.

The foregoing shall also apply to the permanent employees, representatives, proxies and lawyers of the parties, and more generally to all persons in any way subordinate to them.

824. No collective stoppage of work shall be permitted for such time as a dispute is being considered by an arbitration board or tribunal.

Decisions

825. The arbitrators shall give a decision on all questions that have not been the subject of agreement between the parties during the negotiations for a direct settlement or during the conciliation proceedings; their award shall not affect the rights or powers conferred on the parties by the Constitution of the Republic or by any law or contract.

Legal Effects and Period of Validity of Awards

826. An arbitration award shall put an end to a dispute and shall have the force of a collective agreement in relation to all conditions of work.

The period of validity of an arbitration award shall not exceed two years.

No collective stoppage of work shall be permitted for such time as an arbitration award is binding.

Criminal Liability

827. The fact that a strike is ended by agreement between the parties or by an arbitration award shall not relieve either party of liability for offences committed while the strike was in progress.

Division V. Procedure before Arbitration Boards

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Part XI. Miscellaneous Provisions

SOLE CHAPTER

General Provisions as to Ordinary Procedure

857. Disputes for which no special procedure is prescribed (as in the case of the dissolution and liquidation of occupational associations, etc.) shall be subject to the ordinary procedure indicated in this Code.

Application by Analogy

858. In the absence of special provisions for the procedure to be followed in labour suits, the provisions of this Code and otherwise the provisions of the Code of Civil Procedure shall be applicable by analogy.

Notification of Employment Injuries

859. The notifications referred to in sections 434 and 436 of this Code shall be forwarded to the General Inspectorate of Labour and to the competent labour court by the employer, the injured person, his dependants or beneficiaries or the appropriate trade union.

The officials concerned shall keep a register of such notifications and of any reports received on occupational diseases and shall issue certificates reproducing the particulars contained therein. On receipt of a notification the competent official shall order an immediate examination of the injured person by a specialised

medical practitioner, or where there is no such practitioner, by a physician of the forensic medicine department or, where there is no such physician, by any other medical practitioner.

Complaints in Connection with Social Welfare Benefits

860. Application may be made to the General Inspectorate of Labour or to any labour court for assistance in ensuring that social welfare and assistance benefits are granted promptly and effectively.

Inquiries as to the Interpretation of Labour Laws

861. No judicial authority may answer inquiries in connection with the interpretation of labour laws.

Limitation

862. Limitation is a method of obtaining relief from an obligation imposed by, or arising out of, this Code through the passage of a certain period of time and subject to the conditions prescribed in this Chapter.

No person may undertake to waive his right to the operation of limitation, but once the period of limitation has expired a person may waive that right either explicitly by word of mouth or in writing or tacitly on the evidence of incontrovertible facts.

863. The right of an employer to dismiss a worker for just cause or to impose a disciplinary penalty upon him for failure to perform his contract of employment shall, like any proceedings taken in virtue of that right, be barred by limitation after one month reckoned from the day on which the grounds for the dismissal arose or from the day on which the facts which gave rise to the disciplinary penalty became known.

864. The right of a worker to appeal against unwarranted dismissal or against any disciplinary penalty imposed upon him shall, like any proceedings taken in virtue of that right, be barred by limitation after two months reckoned from the termination of the contract or the imposition of the penalty.

865. The right of a worker to terminate his contract of employment for just cause shall, like any proceedings taken in virtue of that right, be barred by limitation after one month reckoned from the day on which the employer gave grounds for the termination of the contract.

866. The right of an employer to claim against a worker for his unwarranted departure from his job shall, like any proceedings taken in virtue of that right, be barred by limitation after one month reckoned from the unwarranted departure.

867. Save as otherwise prescribed, all rights conferred by this Code, the regulations made thereunder and the other labour and social welfare laws and all proceedings taken in virtue of those rights shall, in so far as they do not arise directly out of a contract of employment, be barred by limitation after two months. This period shall be reckoned for employers and workers alike from the date on which the relevant circumstance arose, save, in the case of workers, where there was no possibility of exercising the right or taking the proceedings in question. This last condition shall be proved to the satisfaction of the court.

The period of limitation for claiming payment for overtime shall be reckoned from the date on which the ordinary wage corresponding to the period when the overtime was worked was or should have been paid.

868. The period of limitation shall be interrupted—

(a) if application is made to, or proceedings instituted with, the competent authority;

(b) if the person to whose advantage the period of limitation is operating recognises either explicitly by word of mouth or in writing or tacitly on the evidence of incontrovertible facts that the person to whose disadvantage the said period is operating is within his rights.

The recognition mentioned in this clause shall include payment by the debtor or his discharge of his obligations, even if only in part and irrespective of the manner; and

(c) in a duly proven case of *force majeure* or a fortuitous event.

869. Limitation shall not operate against persons under 16 years of age or persons under any form of disability if they have no legal representative. Such legal representative shall be liable for any damages caused by the operation of limitation to the person whom he represents.

870. Where any circumstance interrupts the operation of limitation for one of a group of persons who are jointly liable for a debt, it shall likewise interrupt it for the others.

871. The effect of the interruption shall be to exclude for the purposes of limitation the whole period preceding the commencement of the interruption.

Conflicts of Jurisdiction

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Cases Pending

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Repeals

874. All statutory provisions conflicting with this Code are hereby repealed, including the following decrees:

(a) Legislative Decree No. 96 of 4 March 1949 [3] to fix public holidays;

(b) Legislative Decree No. 43 of 2 February 1952 [4] to promulgate an Employment Accidents Law;

(c) Legislative Decree No. 44 of 4 February 1952 [5] to promulgate the law on the employment of young persons and women;

(d) Legislative Decree No. 63 of 19 February 1952 to establish a General Directorate of Labour and Social Welfare;

(e) Legislative Decree No. 15 of 12 January 1953 [6] to amend section 40 of Decree No. 44;

(f) Legislative Decree No. 50 of 16 February 1955 [7] to promulgate a Charter of Labour Guarantees;

(g) Legislative Decree No. 59 of 14 March 1955 [8] respecting mediation, conciliation and arbitration;

(h) Legislative Decree No. 101 of 6 June 1955 [9] to promulgate a Law respecting employers' and workers' associations;

(i) Legislative Decree No. 123 of 22 July 1955 respecting the conclusion of collective agreements;

(j) Legislative Decree No. 224 of 20 April 1956 [10] to promulgate a Law respecting individual contracting for employment;

(k) Decree No. 90 of 9 May 1957 to amend section 69 of the Law respecting individual contracting for employment;

(l) Decree No. 114 of 22 July 1957 [11] to promulgate a Railway Labour Law;

(m) Decree No. 133 of 15 August 1957 to replace section 86 of the Law respecting individual contracting for employment;

(n) Decree No. 134-A of the Military Junta of 19 August 1957 [12] to promulgate a Law respecting the Directorate of Labour;

(ñ) Decree No. 169-A of 15 October 1957 to amend sections 17 *(b)* and 45 of the Law respecting employers' and workers' associations;

(o) Legislative Decree No. 7 of 11 March 1958 respecting public holidays;

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[3] *Legislative Series*, 1949 (Hon. 1).
[4] Ibid., 1952 (Hon. 2).
[5] Ibid., 1952 (Hon. 1).
[6] Ibid., 1953 (Hon. 2).
[7] Ibid., 1955 (Hon. 1).
[8] Ibid., 1955 (Hon. 3).
[9] Ibid., 1955 (Hon. 2 B).
[10] Ibid., 1956 (Hon. 1).
[11] Ibid., 1957 (Hon. 1).
[12] Ibid., 1957 (Hon. 2).

(p) Legislative Decree No. 30 of 28 March 1958 to amend the Law respecting employers' and workers' associations; and

(q) Legislative Decree No. 47 of 29 April 1958 to amend the Railway Labour Law.

Commencement of Code

875. This Code shall come into operation on the date of its publication in *La Gaceta*.